United States Court of Appeals

for the Second Circuit

APPENDIX

ORIGINAL

77-7232

United States Court of Appeals
FOR THE SECOND CIRCUIT

UNITED STATES COURT OF APPEALS
FILED
SEP 1 1977
A. DANIEL FUSARO, CLERK
SECOND CIRCUIT

HERBERT FEDERMAN et al.,
Plaintiffs,

against

EMPIRE FIRE AND MARINE INSURANCE COMPANY et al.,
Defendants-Appellees,

and

STUART C. GOLDBERG and JACOB ASCHKENASY,
Additional Defendants on Cross-Claims,

STUART C. GOLDBERG,
Additional Defendant on Cross-Claims, Appellant.

B
P/S

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

APPENDIX

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249 Press of Fremont Payne, Inc., 417 Canal St., N. Y.—966—6570

PAGINATION AS IN ORIGINAL COPY

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MEMORANDUM DECISION AND ORDER OF MACMAHON, D. J. DATED AUGUST 23, 1973, DISMISSING THE ACTION DISQUALIFYING PLAINTIFFS' ATTORNEYS, PERMANENTLY ENJOINING PLAINTIFFS' ATTORNEYS AND GOLDBERG, ETC. 67a

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RELEVANT DOCKET ENTRIES

May 2, 1973	Filed Complaint, Issued Summons.
June 6, 1973	Filed Amended Complaint
June 8, 1973	Filed Defendant Empire Fire & Marine Insurance Company's Notice of Motion Re: Disqualify Attorney's, Ret before MacMahon J. on 6/18/73
June 20, 1973	Filed Defendant Sitomer, Sitomer & Porges' Notice of Motion, Re: Disqualify Attorney's, Ret before MacMahon J. 6/26/73
June 15, 1973	Filed Memorandum and Order by MacMahon J. Plaintiff's Motion to Drop Defendant Stuart Goldberg and to add 43 Shareholders. SETTLE ORDER ON 10 days notice, MacMahon J. m/n
June 19, 1974	Filed Plaintiff's Affidavit and Notice of Motion to Consolidate Actions. Ret. 6-28-74 (Entered in 73 Civ. 4516).
July 3, 1973	Filed Order to Drop and Add Party Defendant Ordered that def. Stuart Goldberg is dropped from this action as a party defendant, and that (43) selling shareholders be added as additional party defendants and the caption is amended accordingly. MacMahon, J.
August 23, 1973	Filed memorandum endorsed on motion filed 6-8-73 - Motion disposed of in accordance with Court's opinion of this date - MacMahon, J.
August 23, 1973	Filed memorandum on motions filed 6-7-73, 6-8-73 and 6-20-73 -- counsel for plaintiffs and Goldberg are enjoined and barred from acting as counsel or participating in any way with counsel for the plaintiffs in this action or in any way future action against Empire involving the same transactions, facts or issues and they are further enjoined from disclosing confidential information regarding Empire to others except to comply with rulings of the Court on discovery proceedings or upon trial. All other injunctive relief requested is denied -- the Affidavits submitted to us in camera, specifically, Goldberg's affidavit of 6-21-73 and Goldberg's affidavit of 1-26-73 prepared for the SEC, shall be made a part of the record and sealed by the Clerk of the Court. In light of the foregoing, it becomes necessary to dismiss the complaint and this action without prejudice. Since

	we have dismissed the action, there is no need to consider plaintiff's motion for an order determining this to be a class action. So Ordered - MacMahon, J. mailed notice.
December 10, 1974	Filed True Copy of Order and Mandate from USCA, that Order of USDC is reversed in part and affirmed in part and that cross-appeals are dismissed in accordance with the opinion of this court, with costs to be taxed against the defendants-appellants and intervenor appellant. . . . Clerk Docketed as a Judgment on 12-13-74 #75,956.m/n
December 23, 1974	Filed Memo-End on motion of 12-13-74 for consolidation. Motion granted on consent. Submit Stipulation within ten (10) days So Ordered, MacMahon, J. m/n
January 19, 1976	Filed Memorandum - Decision #43750. This application under Rule 23 for approval of a settlement and determination of reasonable attorney's fees in this consolidated action is granted. Plaintiffs' counsel shall immediately commence the administration and distribution of the class settlement fund in accordance with the terms of the stipulation of settlement. Within 90 days from the date of this memorandum, plaintiffs' counsel shall submit an affidavit showing compliance with the provisions of the stipulation and settle a final judgment terminating this action insofar as it concerns claims asserted between and among plaintiffs, defendants and additional defendants Aschkenasy. The application for attorney's fees and disbursements is also granted. Plaintiff's attorneys are awarded $178,587.50 as a legal fee and $32,101.65 as disbursements. Settle order within 15 days . . . . MacMahon, J. m/n

Relevant Docket Entries.

February 6, 1976

Filed Order and Judgment that settlement agreement is reasonable and fair and is approved by the Court. The complaints and cross-complaints are dismissed without costs, with prejudice and on the merits, among and between all plaintiffs, defendants and additional defendant (Aschkenasy), and all members of the class except those who have requested exclusion as per order dated 8-22-75 and are permanently barred and enjoined from instituting or prosecuting any claim in either complaint. The Clerk of the Court is authorized to enter a final judgment of dismissal in favor of the defendants and additional defendant, Jacob Aschkenasy, except as set forth in ¶4.

This order and judgment is without prejudice to the claims asserted by the defendants and additional defendant Aschkenasy against additional defendant Stuart Goldberg and the counterclaims and cross-claims by additional defendant (Goldberg), all of which claims are served from the claims asserted by plaintiffs against the defendants. Counsel for the plaintiff class are awarded a fee for all legal services in the total amount of $210,689.15, and they are authorized to withdraw from the proceeds of the settlement fund now being held in Certificates of Deposit of the Morgan Guaranty Trust Co. Counsel for the plaintiffs are directed to file with the Court within 20 days, a written plan for the administration of the Settlement Agreement, as indicated. Upon approval of the plan, counsel shall proceed to administer the settlement in accordance with the terms of the stipulation of settlement and within 20 days after distribution is complete, file an affidavit of compliance with the plan. Jurisdiction is retained by the Court with conditions, as indicated . . . . . MACMAHON, J..... Judgment entered 2-9-76, Clerk m/n

Relevant Docket Entries.

73 Civ 1940 MEYERHOFER -v- EMPIRE FIRE & MARINE INS. CO. 73 CIV 1940 MAC MAHON

DATE	PROCEEDINGS
5-76	Filed addt'l deft (Goldberg) affdvt & notice of motion for an order of recusal & transfer to another Judge of this Court. Ret. 3-19-76
9-76	Filed deft (Sitomer) affdvt re dismissaloof claims asserted by (Goldberg)
10-76	Filed addt'l deft (Aschkenasy) notic of motion for judgment on the pleadings under Rule 12(c). Ret. 3-19-76
-10-76	Filed memo of law in support of motion by Empire defts to dismiss the Goldberg counterclaim.
-10-76	Filed apendix in support of motion by Empire defts to dismiss Goldberg counterclaim.
3-10-76	Filed defts (Empire Fire, et al) notice of motion for judgment on the pleadings dismissing the counterclaim, etc. Ret. 3-19-76
-11-76	Filed Consent Order to substitution of attys for addt'l deft (Stuart C. Goldberg) Thal & Youtt instead of Julien & Schlesinger.
3-29-76	Filed Memo-End. on motion of 3-5-76. Motion denied following oral argument.....MAC MAHON,J m/n
3-31-76	Filed affdvt in opposition to dismiss motions re Stuart Charles Goldberg, on his cross & counterclaims.
3-31-76	Filed (Goldberg) memo of law in opposition to motion to dismiss.
-1-76	Filed reply memorandum of law submitted by addt'l-deft (Aschkenasy).
-76	Filed continued deposition of Stuart Charles Goldberg of 6-30-75.
1-76	Filed continued deposition of Stuart Charles Goldberg of 7-7-75.
-1-76	Filed continued deposition of Studrt Charles Goldberg of 9-17-76.
-1-76	Filed continued deposition of Stuart Charles Goldberg of 9-18-76.
-1-76	Filed continued deposition of Stuart Charles Goldberg of 11-3-76.
-6-76	Filed notice of change in deposition of witness (Goldberg) taken on days indicated.
-3-76	Filed Order that the administrators, are hereby authorized to withdraw from the Settlement Fund the sum of $8,062.68 to use for the payment or reimbursement of expenses scheduled in the annexed affdvt of Berthold H. Hoeinger.....MAC MAHON,J. m/n
1-11-76	Filed Consent Order that accounting & distributionof the Net Settlement Fund, etc to class memebers in the annexed Plan of Distribution is approved. Counsel for pltffs are to proceed as promplty after 11-15-76, & upon completion to file an affdvt to that effect with this Court, & upon the filing of such affdvt this action shall be terminated, etc.....MAC MAHON,J. m/n
2-23-76	Filed amendment to amended answer of addt'l deft (Goldberg).
2-23-76	Filed by attys for class affdvt of completion of settlement fund distribution.
-5-77	Filed defts (Empire, G. Gross & Y. Kaplan's) notice of motion to dismiss the first & second counterclaims asserted against them re amended answer of addt'l deft (Goldberg). Ret. 1-14-77.
1-5-77	Filed (Empire defts) memo of law in support of motion to dismiss (Goldberg) counterclaims).
5-77	Filed notice of motion by addt'l deft (J. Aschkenasy) for an order pursuant to Rule 12(g)(6) dismissing the first & second cross-claim & counterclaim asserted against him of addt'l deft (Goldberg)
-5-77	Filed by addt'l deft (Aschkenasy) memo of law in support of his motion to dismiss the cross-claims & counterclaims re addt'l deft (Goldber
-6-77	Filed (Sitomer defts) notice of motion dismissing the cross-claims of addt'l deft (Stuart Goldberg). Ret. 1-14-77
6-77	Filed (Sitomer defts) memo of law in support of motion to dismiss (Goldberg's)cross-claims.

Con't on Page #10

Relevant Docket Entries.

VIL DOCKET CONTINUATION SHEET

MAC MAHON, J

77-1040

PAGE 2 OF ___ PAGES

DATE	NR.	PROCEEDINGS
-11-77		Filed (Stuart Goldberg's) memo of law in opposition to defts motion to dismiss.
-13-77		Filed reply memorandum on behalf of the (Empire) defts.
-13-77		Filed addt'l deft (Goldberg's) demand for a jury trial.
-12-77		Filed Memo Endorsed on motion filed 1-5-77-- See Opinion of this date.-- MacMahon, J.(m.n)
-12-77		Filed Memo Endorsed on motion filed 1-5-77-- See Opinion of this date.-- MacMahon, J. (m/n)
-12-77		Filed Memo Endorsed on motion filed 1-6-77-- See Opinion of this date.-- MacMahon, J. (m.n)
-12-77		Filed Opinion #40776--Accordingly, we deny the motions to dismiss without prejudice and retain jurisdiction over the case but suspend all further proceedings herein pending the commencement and final determination of an action or actions in state court encompassing all the state claims, cross-claims and counterclaims of the parties alleged in the [illegible]. -- MacMahon, J. (m/n)
-10-77		Filed defts. Stuart C. Goldberg, notice of appeal to the U.S. C.A. 2nd circuit form the order suspending all further prodeedings herein pending the commencement and final determination of an action or actions in state court encompassing all the state claims, cross claims and counter claims of the parties entered on 4-12-77 and from the order entered on 3-29-76. Mailed copies to Damato Costello & Shea, Aranow, [illegible], Billingham, Davis & Davis & Hart & Hume.

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Oct 25 9 52 AM '7

United States District Court
Southern District of New York

----------x

Herbert Federman and Dietrich Meyerhofer,

Plaintiffs

-against-

Empire Fire and Marine Insurance Company, Gary O. Gross, Yale J. Kaplan, Francis J. Kratky, Nick Lalich, Lester C. Swick, M. M. Jennings, Jr., Robert A. Phillips, Sitomer, Sitomer & Porges, Alvin Lester Sitomer, Stephen Joel Sitomer, Robert E. Porges, Marilyn P. Kaplan, Jo Ellen Kratky, John W. Stahn, P. L. Christensen, Gladys H. Christensen, Jennings Agency, Inc., William D. Brecht, Sheldon J. Gensler, Irvin E. Schermer, Frank E. Landis, John Murphy, Mabel Murphy, John Shelby, Florence Shelby, Lettie E. Swick and John Doe #1 through #27,

Defendants

----------x

JUDGE MAC MAHON

Complaint

Class Action

Plaintiffs allege (on knowledge as to ¶¶ 1, 2(a), 8, 9 and 14):

Jurisdiction

1. Jurisdiction of this court is invoked under §§ 11, 12 and 22 of the Securities Act of 1933 (15 USC §§77a et seq) and §§10(b) and 27 of the Securities Exchange Act of 1934 (15 USC §§78a et seq), the rules of the Securities and Exchange Commission promulgated thereunder and upon principles of pendent jurisdiction.

Class Action

2. (a) Plaintiffs bring this action on their own behalf and on behalf of all other persons similarly situated, namely, all persons who purchased stock of Empire Fire and Marine Insurance Company ("Empire") on May 31, 1972 or thereafter.

(b) The number of persons of the class is in excess of 5,000.

(c) The common questions of law and fact predominate over questions affecting individual members; these common questions include the question of whether Empire's registration statement and prospectus dated May 31, 1972 was false and misleading.

(d) Plaintiffs will fairly and adequately protect the members of the class since their interests and the interests of the class are identical and they have no interests adverse to the interests of the class.

(e) There are no unusual difficulties likely to be encountered in the management of this action and a class action is superior to other available methods for the efficient adjudication of this controversy.

First Count

3. Prior to May 31, 1972, Empire filed with the Securities and Exchange Commission a registration statement under the Securities Act of 1933 which became effective on May 31, 1972.

4. Pursuant to a public offering made pursuant to the aforesaid registration statement, Empire sold to the public 355,773 shares of its common stock and other selling stockholders described in ¶11 hereof sold an aggregate of 144,227 shares, all at a price of $16 a share or an aggregate of $8,000,000.

5. (a) Empire, a Nebraska corporation, signed the registration statement as issuer.

(b) Defendants Gary O. Gross, Yale J. Kaplan, Robert A. Phillips, Francis J. Kratky, Nick Lalich, Lester C. Swick and M. M. Jennings, Jr., were directors of Empire when the registration statement became effective and at all relevant times thereafter.

(c) At all relevant times Gary O. Gross was a controlling person of Empire.

(d) Defendant Sitomer, Sitomer & Porges (the "Sitomer firm") acted as counsel to Empire in the preparation of the prospectus and registration statement. Their name appears under the caption "Legal Matters" at page 22 of the prospectus; defendants Alvin Lester Sitomer, Stephen Joel Sitomer and Robert E. Porges were at all relevant times partners in the Sitomer firm.

6. The registration statement and the prospectus forming a part thereof (the "prospectus") stated that:

(a) Net proceeds from the public offering was $5,293,202.24" before deducting expenses estimated at $200,000";

(b) "The Company will receive approximately $5,090,000 from the sale of the 355,773 shares of common stock being offered for its account";

(c) "In October, 1971, Empire Management Company sold 200 shares of its common stock for $306.75 per share to the following persons: SITOMER, SITOMER AND PORGES, 100 shares....". [adjusted after stock split to 14,982 shares at $2.05 per share]

7. The registration statement and the prospectus were materially false and misleading in that:

(a) Defendants knew that additional fees of $200,000 would be paid to the Sitomer firm and that therefore such estimated expenses would actually be $400,000 and should have been disclosed as such.

(b) The registration statement and prospectus failed to disclose that Empire had agreed to pay the Sitomer firm $200,000 in cash, that the said law firm was receiving as part of its compensation approximately $38,439 in guaranteed cash profits on the secondary offering from sale of part of the Empire stock it purchased at a bargain price and would receive an increase of approximately $167,000 in value of the Empire stock it retained, all of which consideration was paid to the said law firm as a finder's fee. The registration statement and prospectus failed to disclose the said payment and amount of the compensation paid to the Sitomer firm and the fact that the compensation was paid in return for finders and related services.

(c) Defendants knew that the net proceeds described in the registration statement and prospectus as $5,090,000 from the sale of 355,773 shares of Empire's common stock was overstated by $200,000, since an additional $200,000 fee was to go to the Sitomer firm.

(d) The registration statement and prospectus failed to disclose that the sale of stock of the Sitomer firm was not a pure sale of stock but rather was part of a compensation arrangement providing a finder's fee or similar compensation contingent upon a successful public offering and that the $38,439 in realized gain and approximately $167,000 gain by way of appreciation in value of retained stock was an additional finder's fee because Empire had guaranteed the loan by which the Sitomer firm obtained the proceeds required to acquire the Empire stock and as a result the Sitomer firm was guaranteed windfall profits upon the completion of the public offering.

(e) The prospectus failed to disclose that $200,000 of the fees to be paid to the Sitomer firm was contingent upon a successful public offering of Empire stock.

(f) The actual date of the acquisition by the Sitomer firm of its common stock was December 20, 1971 and was back-dated in order to avoid disclosure required by Item 25 of Form S-1 under the Securities Act of 1933.

(g) The use of the proceeds section of the prospectus failed to disclose that $200,000 of the proceeds of the offering would be used as a finder's fee to the Sitomer firm.

Complaint.

8. (a) On or about May 31, 1972, plaintiff Herbert Federman purchased 200 shares of Empire common stock at the offering price of $16 a share for a net consideration of $3200. One Hundred shares were sold on August 19, 1972 for an aggregate price of $1,329.04 (or a loss of approximately $270 on the said shares). Plaintiff Federman retains the other 100 shares which have a present market value of approximately 5-5/8.

(b) Plaintiff Meyerhofer purchased 100 shares of Empire common stock on January 4, 1973 at a price of $17 a share (or a total cost including commissions of $1,734.10); said plaintiff retained said 100 shares which have a present market value of approximately 5-5/8.

9. Plaintiffs did not discover, and could not have discovered by the exercise of reasonable diligence, the untrue statements or omissions within one year of the commencement of this action.

Second Count

10. Plaintiffs repeat and reallege ¶¶ 3 to 9 inclusive.

11. Pursuant to the registration statement, the following defendants (the "selling shareholders") sold shares of Empire stock to the public at $8 per share:

Complaint.

Name	Shares Sold in Public Offering
Gary C. Gross	82,766
Nick and Rosella Lalich	14,993
Yale Kaplan	13,424
Yale and Marilyn P. Kaplan	310
Francis J. & Jo Ellen Kratky	7,286
Robert A. Phillips	5,064
John W. Stahn	4,170
Sitomer, Sitomer & Porges	2,996
P. L. & Gladys H. Christensen	2,862
Jennings Agency, Inc.	1,980
William D. Brecht	1,258
Sheldon J. Gensler	1,008
Irvin E. Schermer	1,008
Frank E. Landis	936
John and Mabel Murphy	400
John and Florence Shelby	266
John Shelby	26
Lester C. and Lettie E. Swick	222
John Doe #1 through #27	3,252
Total	144,227

12. Plaintiffs had no knowledge of the untrue statements and omissions heretofore alleged.

13. The sale of Empire stock to plaintiffs and to the members of the class was by means of a prospectus and was made by the use of means or instruments of transportation or communication in interstate commerce and of the mails.

Complaint.

14. Plaintiffs, on behalf of themselves and members of the class, tender the shares of Empire stock held by them upon condition that payment in full on any judgment rendered be made.

Third Count

15. Plaintiffs repeat and reallege ¶¶ 3 to 8 and 11, inclusive.

16. In connection with the aforesaid sales and purchases of securities, defendants, singly and in concert, directly or indirectly, by the use of means or instrumentalities of interstate commerce and of the mails, in the Southern District of New York and elsewhere in the United States: (a) employed devices, schemes and artifices to defraud; (b) made untrue statements of material facts and omitted to state material facts necessary in order to make the statements made in the light of the circumstances under which they were made, not misleading; and (c) engaged in acts, practices and a course of business which would and did operate as a fraud and deceit upon plaintiffs and members of the class.

17. As part of the fraudulent scheme described herein, the Sitomer firm on or about June 8, 1972 prepared two bills which stated that the firm was charging $175,000 for legal work other than that done on the registration statement and $120,000 for legal work done on the registration statement. The Sitomer firm had no basis for allocating the $175,000 charge to legal work performed on other than registration matters and the allocation was made falsely to justify as a legal fee, compensation which was in fact a finder's fee.

Complaint.

10. As part of the aforesaid scheme to defraud, defendant Gross caused Empire to falsely confirm to its auditors that Empire had not guaranteed any loans or agreed to repurchase any stock which collateralized any loans, when in fact Empire had by letter dated December 16, 1971 signed by defendant Gross guaranteed or agreed to repurchase collateral for a loan made to the Sitomer firm by a bank in New York City. The false confirmation was made to conceal the fact that the Sitomer firm was receiving by way of cheap stock, finder's fee or similar payments.

Wherefore, plaintiffs demand judgment:

(a) As to the first count, awarding judgment to plaintiffs and members of the class they represent against all defendants other than the selling shareholders, damages in accordance with the formula prescribed under §11e of the Securities Act of 1933;

(b) As to the second count, awarding judgment to the plaintiffs and the class they represent against Empire and its selling shareholders in the total amount of all damages sustained by plaintiffs and themembers of the class in accordance with the formula prescribed under §12 of the Securities Act of 1933;

(c) As to the third count, awarding judgment to plaintiffs and the class they represent as against all defendants on behalf of plaintiffs and the class in the total amount of all damages sustained by plaintiffs and the members of the class;

Complaint.

(d) As to all counts, awarding such other and further relief as may be just, together with the costs and expenses of the action, including the reasonable fees of the plaintiffs' attorneys.

Sheib, Shatzkin & Cooper

By: _____
A Member of the Firm
Attorneys for Plaintiffs
235 E. 42nd Street
New York, N.Y. 10017
MU 7-8800

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

HERBERT FEDERMAN, et ano., :

Plaintiffs, : 73 Civ. 4516 (L.F.M.)

- against - :

ANSWER AND CROSS-CLAIMS

EMPIRE FIRE AND MARINE INSURANCE COMPANY, et al., :

Defendants. :

---------- X

Defendant Empire Fire and Marine Insurance Company ("Empire") and defendants Gary O. Gross, Yale J. Kaplan, Francis J. Kratky, Nick Lalich, Lester C. Swick, M.M. Jennings, Jr., Robert A. Phillips, Marilyn P. Kaplan, Jo Ellen Kratky, Jennings Agency, Inc., William D. Brecht, Shelden J. Gensler, Irvin E. Schermer, Frank E. Landis, John Shelby, Florence Shelby and Lettie E. Swick ("directors and/or the selling shareholders"), answering the complaint:

1. Deny that plaintiffs have any claim against these defendants under any of the statutes or rules referred to in paragraph 1 of the complaint or for any other reason.

2. Deny that they have knowledge or information sufficient to form a belief with respect to the allegations contained in paragraph 2 of the complaint, except deny the allegations contained in paragraph 2(d).

3. Admit the allegations contained in paragraph 3 of the complaint and further allege that Empire filed its registration statement with the Securities and Exchange Commission on or about March 28, 1972.

4. Deny each and every allegation contained in paragraph 4 of the complaint, except admit: Empire filed a registration statement with the Securities and Exchange Commission with respect to the public offering of 500,000 shares of Empire's common stock, 355,773 being sold by Empire and 144,227 being sold by certain shareholders. The registration statement became effective on May 31, 1972 and the 500,000 shares were sold at $16 per share, or an aggregate of $8,000,000, to a syndicate of underwriters consisting of 65 firms managed by Faulkner, Dawkins & Sullivan Securities Corp.

5. Admit the allegations contained in subparagraphs (a) and (b) of paragraph 5 of the complaint; deny each and every allegation contained in subparagraph (c); admit the allegations contained in the first sentence of subparagraph (d) and further allege that the law firm of Sitomer, Sitomer & Porges ("the Sitomer firm") rendered legal services to Empire, its directors and the selling shareholders both in connection with the registration statement and other legal matters and received compensation from Empire for these services; admit

the allegations contained in the second sentence of subparagraph (d) and respectfully refer to the prospectus for the information contained therein.

6. Deny each and every allegation contained in paragraph 6 of the complaint and with respect to these allegations, respectfully refer to the registration statement and prospectus for their contents.

7. Deny each and every allegation contained in paragraph 7 of the complaint, except admit that a purchase by the Sitomer firm of 100 shares of stock of Empire Management Company was authorized at a special meeting of its board of directors held on October 28, 1971; that the Sitomer firm paid the sum of $30,675 for the shares; that on March 20, 1972 Empire Management Company was merged into Empire and as a result of the merger the Sitomer firm received 14,982 Empire shares in exchange for its 100 shares of Empire Management Company; that Empire agreed to purchase from the Bank of Commerce, on certain stated conditions, the Empire Management Company stock pledged by the Sitomer firm as collateral; that Empire was never required to and did not purchase these shares; and that subsequent to May 31, 1972 Empire paid the Sitomer firm $200,000 in legal fees and further deny that there was any arrangement whereby Empire was to pay a finder's fee to the Sitomer firm.

8. Deny that they have knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 8 of the complaint.

9. Deny that they have knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 9 of the complaint.

10. In response to paragraph 10 of the complaint, incorporate by reference the answers to paragraphs 3 to 9 inclusive.

11. Deny each and every allegation contained in paragraph 11 of the complaint, except admit the facts appearing under the heading "Selling Shareholders" on pages 18 to 19 of the Empire final prospectus dated May 31, 1972.

12. Deny that they have knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 12 of the complaint.

13. Deny that they have knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 13 of the complaint, except admit that the public offering was pursuant to a registration statement and prospectus duly filed with the Securities and Exchange

Commission and further allege that neither plaintiffs nor any member of the alleged class purchased any stock from Empire, its directors or the selling shareholders.

14. In response to paragraph 15 of the complaint, incorporate by reference the answers to paragraphs 3 to 8 and 11, inclusive.

15. Deny each and every allegation contained in paragraph 16 of the complaint.

16. Deny each and every allegation contained in paragraph 17 of the complaint, except admit that Empire was billed for legal services by the Sitomer firm.

17. Deny each and every allegation contained in paragraph 18 of the complaint, except incorporate by reference the relevant portions of paragraph 7 of this answer and respectfully refer to the relevant letters for their substance.

AS A FIRST DEFENSE, ALLEGE:

18. The complaint fails to state a claim upon which relief can be granted against Empire, its directors or the selling shareholders.

AS A SECOND DEFENSE, ALLEGE:

19. The alleged omissions and misstatements were not material.

AS A THIRD DEFENSE, ALLEGE:

20. Any damages allegedly sustained by plaintiffs or their purported class were not caused by depreciation in

the value of Empire's stock resulting from any omission or misstatement in Empire's registration statement, from any failure to disclose fees paid by Empire to the Sitomer firm or from any other act alleged in the complaint.

AS A FOURTH DEFENSE, ALLEGE:

21. Plaintiffs and the various members of the alleged class they purport to represent purchased their stock not from Empire, its directors or the selling shareholders but directly or indirectly from various underwriters who acted for their own account pursuant to a firm-commitment underwriting. There was no privity between Empire, its directors or the selling shareholders and plaintiffs or any member of the purported class.

AS A FIFTH DEFENSE, ALLEGE:

22. No liability exists under Section 10(b) of the Securities Exchange Act with respect to any stockholder of Empire who sold his stock prior to April 30, 1973.

AS A SIXTH DEFENSE, ALLEGE:

23. Empire, its directors and the selling shareholders at all times acted in good faith and in reliance on legal counsel.

AS A SEVENTH DEFENSE, ALLEGE:

24. Empire, its directors and the selling shareholders did not have knowledge of, did not have reasonable grounds to believe that there were, and in the exercise of reasonable care could not have known of, any alleged untruth or omission in Empire's registration statement.

AS AN EIGHTH DEFENSE, ALLEGE:

25. Empire, its directors and the selling shareholders had, after reasonable investigation, reasonable ground to believe and did believe that the statements contained in Empire's registration statement, at the time it became effective, were true and that there was no omission to state a material fact required to be stated or necessary to make the statements contained in the registration statement not misleading.

AS A NINTH DEFENSE, ALLEGE:

26. With respect to the particular omissions and misstatements alleged in the complaint, Empire, its directors and the selling shareholders relied on their legal counsel as experts and had no reasonable ground to believe, and did not believe, at the time Empire's registration statement became effective that any statements contained in the registration

statement were untrue or that there was an omission to state a material fact required to be stated or necessary to make the statements made not misleading.

AS A FIRST CROSS-CLAIM AGAINST THE SITOMER FIRM, ALVIN L. SITOMER, STEPHEN J. SITOMER, ROBERT E. PORGES, STUART C. GOLDBERG AND JACOB ASCHKENAZY, ALLEGE:

27. During the period in which the events in issue in this action occurred, the Sitomer firm was a New York law partnership, was actively engaged in the practice of law in New York City and held itself out as having expertise with respect to securities law and public offerings of stock.

28. The partners of the Sitomer firm included Alvin L. Sitomer, Stephen J. Sitomer, Robert E. Porges and Stuart C. Goldberg ("Goldberg").

29. In or about September of 1971, Empire retained the Sitomer firm to render legal services in connection with the offering of Empire stock in issue in this action.

30. The Sitomer firm and its partners acted as counsel to Empire, its directors and the selling shareholders and in that capacity prepared and filed with the Securities and Exchange Commission the registration statement in issue and rendered legal opinions regarding the Empire offering.

31. Jacob Aschkenazy ("Aschkenazy") was employed by the Sitomer firm as an associate and worked extensively on the offering of Empire stock in issue in this action and his name appeared on the cover page of Empire's registration statement.

32. Goldberg also rendered legal services to Empire, its directors and the selling shareholders in connection with various aspects of the offering in issue.

33. It was the obligation of the Sitomer firm, its partners and Aschkenazy to ensure that Empire's registration statement disclosed all matters required to be disclosed and that it otherwise complied with applicable legal requirements, and Empire, its directors and the selling shareholders relied on them for this purpose.

34. Relying on the Sitomer firm, its partners and Aschkenazy, Empire, its directors and the selling shareholders in good faith believed that Empire's registration statement was complete and accurate; that it contained no misstatements or omissions, and that it complied with all applicable legal requirements.

35. If Empire, its directors or the selling shareholders incur any liability in this action by reason of any alleged misstatements or omissions in Empire's registration statement, including the alleged failure to disclose certain

facts regarding the Sitomer firm's compensation, such liability will have been caused not by any wrongdoing on the part of Empire, its directors or the selling shareholders, but rather by the negligence and malpractice of the Sitomer firm, its partners and Aschkenazy in failing to ensure that Empire's registration statement, prepared by them, properly disclosed all facts required to be disclosed and otherwise complied with applicable legal requirements.

36. Accordingly, while Empire, its directors and the selling shareholders deny that there is any basis for a judgment against them in this action, if such a judgment is rendered against them, they are entitled to be indemnified against such liability by the Sitomer firm, its partners and Aschkenazy. In addition, independently of such a judgment, they are also entitled to reimbursement from the Sitomer firm, its partners and Aschkenazy for the expenses incurred in the defense of this action, including attorneys' fees.

AS A SECOND CROSS-CLAIM AGAINST
THE SITOMER FIRM, ALVIN L. SITOMER,
STEPHEN J. SITOMER, ROBERT E. PORCES,
STUART C. GOLDBERG AND JACOB ASCHKENAZY,
ALLEGE:

37. The allegations contained in paragraphs 27 through 35, inclusive, of this answer are incorporated by reference.

38. If a judgment is rendered in this action against Empire, its directors or the selling shareholders, these defendants will be entitled to contribution from the Sitomer firm, its partners and Aschkenazy.

AS A THIRD CROSS-CLAIM AGAINST THE SITOMER FIRM, ALVIN L. SITOMER, STEPHEN J. SITOMER, ROBERT E. PORGES, STUART C. GOLDBERG AND JACOB ASCHKENAZY, ALLEGE:

39. The allegations contained in paragraphs 27 through 35, inclusive, of this answer are incorporated by reference.

40. In connection with the registration statement and prospectus prepared and filed by the Sitomer firm, its partners and Aschkenazy, Empire and defendant Gary O. Gross ("Gross") have been subjected to legal and administrative proceedings and have thereby incurred substantial expenses, including attorneys' fees, as a result of the negligence and malpractice of the Sitomer firm, its partners and Aschkenazy.

41. By reason of the foregoing, Empire and Gross have sustained damages in the sum of $150,000 and are entitled to reimbursement from the Sitomer firm, its partners and Aschkenazy for these expenses.

AS A FOURTH CROSS-CLAIM AGAINST THE SITOMER FIRM, ALVIN L. SITOMER, STEPHEN J. SITOMER, ROBERT E. PORGES, STUART C. GOLDBERG AND JACOB ASCHKENAZY, ALLEGE:

42. The allegations contained in paragraphs 27 through 35 and 40, inclusive, of this answer are incorporated by reference.

43. As a result of the negligence and malpractice of the Sitomer firm, its partners and Aschkenazy, Gross has incurred liabilities in the sum of $309,928.80, for which he is entitled to reimbursement.

AS A FIFTH CROSS-CLAIM AGAINST THE SITOMER FIRM, ALLEGE:

44. The allegations contained in paragraphs 27 through 35, 40, 41 and 43, inclusive, of this answer are incorporated by reference.

45. By reason of the foregoing, Empire is entitled to have refunded to it all legal fees paid to the Sitomer firm with respect to services rendered as to which the Sitomer firm, its partners and Aschkenazy have been guilty of negligence and malpractice.

WHEREFORE, defendants Empire, its directors, Gross and the selling shareholders request judgment (i) dismissing

the complaint as against them and (ii) on their respective cross-claims, granting them indemnity, contribution and damages, together with costs, disbursements and attorneys' fees, and such further relief as the Court may deem proper.

ARANOW, BRODSKY, BOHLINGER, BENETAR
& EINHORN

By: Andrew J. Terrizzi
(A Member of the Firm)

Attorneys for Defendants Empire Fire
and Marine Insurance Company, et al.

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New York, New York 10017
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Answer of Additional Defendant Goldberg to Cross-Claims of Defendant Emplire, et al. and Cross Claim.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

HERBERT FEDERMAN, et ano,

Plaintiffs,

-against-

EMPIRE FIRE AND MARINE INSURANCE COMPANY, et al.,

Defendants.

-and-

STUART C. GOLDBERG and JACOB ASCHKENAZY,

Additional Defendants on Cross-Claims.

----------x

73 Civ. 4516 (L.F.M.)

ANSWER OF ADDITIONAL DEFENDANT GOLDBERG TO CROSS-CLAIMS OF DEFENDANTS EMPIRE, ET AL. AND CROSS-CLAIMS.

Additional defendant Stuart C. Goldberg ("Goldberg"), by Hart & Hume and Wormser, Kiely, Allessandroni, Mahoney & McCann, his attorneys, for his answer to the cross-claims of defendant Empire Fire and Marine Insurance Company ("the Company") and defendants Gary O. Gross, Yale J. Kaplan, Francis J. Kratky, Nick Lalich, Lester C. Swick, M.M. Jennings, Jr., Robert A. Phillips, Marilyn P. Kaplan, Jo Ellen Kratky, Jennings Agency, Inc., William D. Brecht, Shelden J. Gensler, Irvin E. Schermer, Frank E. Landis, John Shelby, Florence Shelby and Lettie E. Swick (all of the foregoing and the Company hereinafter, collectively, "Empire"), alleges as follows:

AS TO EMPIRE'S FIRST CROSS-CLAIM

1. Denies knowledge or information thereof sufficient to form a belief as to each and every allegation contained in paragraph numbered "27", except admits that the law firm of Sitomer, Sitomer & Porges ("the Sitomer firm") was a law firm engaged in the practice of law in New York.

Answer of Additional Defendant Goldberg.

2. Denies each and every allegation contained in the paragraph numbered "28" except admits, upon information and belief, that Alvin L. Sitomer, Stephen J. Sitomer and Robert E. Porges ("the Partners") were partners in the Sitomer firm between November 15, 1971 and January 21, 1973 and specifically denies that Goldberg was a partner in the Sitomer firm but admits that he was associated with the Sitomer firm pursuant to a certain written agreement (to which Goldberg begs leave to refer for the terms, conditions and contents thereof) until January 21, 1973.

3. Denies knowledge or information thereof sufficient to form a belief as to each and every allegation contained in paragraph numbered "29" except admits, upon information and belief, that in or about September, 1971 the Company entered into an arrangement with the Sitomer firm and agreed to pay the Sitomer firm for certain services in connection therewith.

4. Denies knowledge or information thereof sufficient to form a belief as to each and every allegation contained in the paragraph numbered "30", except admits, upon information and belief, that the Sitomer firm and the Partners and additional defendant Jacob Aschkenazy ("Aschkenazy") participated in the preparation and filing of the registration statement and prospectus with the Securities & Exchange Commission ("SEC"), referred to in the complaint.

5. Denies knowledge or information thereof sufficient to form a belief as to each and every allegation contained in the paragraph numbered "31", except admits, upon information and belief, that between November 15, 1971 and January 21, 1973, Aschkenazy was employed by or was a partner in the Sitomer firm,

worked extensively on the offering of the Empire stock in issue in this action and that his name appeared on the cover page of the registration statement.

6. Denies each and every allegation contained in the paragraph numbered "32" and further denies that there ever was any attorney-client relationship between Goldberg and Empire or any of them.

7. Denies knowledge or information thereof sufficient to form a belief as to each and every allegation contained in the paragraphs numbered "33" and "34", except denies, upon information and belief, that Empire or any of them ever relied upon the Sitomer firm or Goldberg for any purpose as alleged in Empire's cross-claims herein.

8. Denies each and every allegation contained in the paragraphs numbered "35" and "36".

AS TO EMPIRE'S SECOND CROSS-CLAIM

9. Denies and admits, as above, each and every allegation incorporated by reference in the paragraph numbered "37".

10. Denies each and every allegation contained in the paragraph numbered "38".

AS TO EMPIRE'S THIRD CROSS-CLAIM

11. Denies and admits, as above, each and every allegation incorporated by reference in the paragraph numbered "39".

12. Denies knowledge or information sufficient to form a belief as to each and every allegation contained in the paragraphs numbered "40" and "41", except denies upon information and belief, that Empire or any of them ever relied upon the Sitomer firm or Goldberg for any purpose alleged in Empire's cross-claims herein.

Answer of Additional Defendant Goldberg.

AS TO EMPIRE'S FOURTH CROSS-CLAIM

13. Denies and admits, as above, each and every allegation incorporated by reference in the paragraph numbered "42".

14. Denies knowledge or information thereof sufficient to form a belief as to each and every allegation incorporated by reference in the paragraph numbered "43", except denies, upon information and belief, that Empire or any of them ever relied upon the Sitomer firm or Goldberg for any purpose alleged in Empire's cross-claims herein.

AS TO EMPIRE'S FIFTH CROSS-CLAIM

15. Denies and admits, as above, each and every allegation incorporated by reference in the paragraph numbered "44".

16. Denies knowledge or information thereof sufficient to form a belief as to each and every allegation contained in the paragraph numbered "45", except denies, upon information and belief, that Empire or any of them ever relied upon the Sitomer firm or Goldberg for any purpose alleged in Empire's cross-claims herein.

AS AND FOR A FIRST AFFIRMATIVE DEFENSE

17. Empire's cross-claims fail to state a claim upon which relief can be granted against Goldberg.

AS AND FOR A SECOND AFFIRMATIVE DEFENSE

18. Any claims or causes of action which Empire has or may have had against Goldberg by reason of the matters alleged in Emprie's cross-claims herein and any of them are barred by the Statutes of Limitations applicablethereto.

AS AND FOR A THIRD AFFIRMATIVE DEFENSE

19. Upon information and belief, Empire and the various parties thereof were knowing participants in any material mis-

statements, omission, fraud, collusion, negligence, wrongdoing, breach of fiduciary obligation and the other acts, errors or omissions alleged in the complaint and in Empire's cross-claims herein without any participation therein or knowledge thereof by Goldberg.

20. By virtue thereof under the Federal Securities Laws, common law and in equity Empire and the various parties thereof may not have any recovery herein against Goldberg.

AS AND FOR A FOURTH AFFIRMATIVE DEFENSE

21. If the allegations of the complaint and Empire's cross-claims were true (which latter Goldberg denies) Empire and the various parties thereof would be and are barred from any recovery against Goldberg in that, among other things, judicial enforcement of Empire's cross-claims against Goldberg would be and is contrary to the public policy embodied in the Federal Securities Laws, common law and in equity in that, among other things, Empire and the various parties thereof were actively involved and participated in the various acts, errors and omissions alleged in the complaint and in Empire's cross-claims herein with full knowledge thereof and without any participation therein or knowledge thereof by Goldberg.

AS AND FOR A FIFTH AFFIRMATIVE DEFENSE

22. If the allegations contained in the complaint and Empire's cross-claims were true (which latter Goldberg denies) Empire and the various parties thereof would be and are barred from any recovery against Goldberg in that, among other things, Empire and the various parties thereof or all or some of them were in pari delicto with the Sitomer firm and/or the Partners thereof and/or Aschkenazy in the commission thereof and in con-

nection with which Goldberg was not a party or involved therein or had knowledge thereof.

AS AND FOR A SIXTH AFFIRMATIVE DEFENSE

23. If the allegations contained in the complaint and Empire's cross-claims were true (which latter Goldberg denies), Empire and the various parties thereof would be and are barred from any recovery against Goldberg herein in that, among other things, Empire, the Company and its officers and directors and all or some of them, had actual or imputed knowledge of the matters alleged to constitute violations of the Federal Securities Laws at or prior to the effective date of the registration statement and prospectus involved in this action without any participation therein or knowledge thereof by Goldberg.

AS AND FOR A SEVENTH AFFIRMATIVE DEFENSE

24. If the allegations contained in the complaint and Empire's cross-claims were true (which latter Goldberg denies), Empire and the various parties thereof would be and are barred from any recovery against Goldberg in that, among other things, Empire and the various parties thereof would have profited and will profit from their own wrongdoing and would be and will be unjustly enriched by any recovery against Goldberg herein.

AS AND FOR AN EIGHTH AFFIRMATIVE DEFENSE

25. If the allegations contained in the complaint and Empire's cross-claims were true (which latter Goldberg denies), Empire and the various parties thereof would be and are barred from any recovery against Goldberg herein in that, among other things, Empire and the various parties thereof did fail or would have failed to exercise reasonable diligence to discover the existence of those matters alleged to constitute violations of the Federal Securities Laws and otherwise.

AS AND FOR A NINTH AFFIRMATIVE DEFENSE

26. Goldberg is not and cannot be liable to Empire and the various parties thereof in that, among other things, Goldberg had no reasonable ground to believe and did not believe at the time the registration statement and prospectus involved herein became effective, that any of the statements contained in said registration statement and prospectus were untrue or that there was any omission to state a material fact required to be stated therein or necessary to make any statement therein not misleading or that said registration statement and prospectus did not fairly represent the true terms and conditions of the public offering involved or of the material facts relating thereto.

AS AND FOR A TENTH AFFIRMATIVE DEFENSE

27. Goldberg is not and cannot be held liable to Empire or any of the parties thereof in any amount in that, among other things, Empire, in collusion with the Sitomer firm, the Partners thereof and/or Aschkenazy, deliberately, knowingly and wilfully concealed from Goldberg certain facts and information regarding matters which should have been included in the registration statement to make the same not misleading and to fairly represent the true terms and conditions of the public offering involved or of material facts relating thereto or which would have revealed that certain of the statements contained in the registration statement were untrue or that there were omissions in said registration statement.

28. Upon becoming aware of certain of the aforementioned facts which had been concealed from him as aforesaid, Goldberg endeavored to persuade the Sitomer firm, the Partners thereof and

Aschkenazy and, through them, Empire and the various parties thereof, to take such remedies and corrective steps as were necessary and proper in the premises, which they refused to do.

29. Upon such refusal, Goldberg immediately resigned from his association with the Sitomer firm and took such steps as were necessary and proper in the premises to bring the matter to the attention of the appropriate authorities.

AS AND FOR AN ELEVENTH AFFIRMATIVE DEFENSE

30. This court lacks jurisdiction of the subject matter of Empire's cross-claims herein in that there is no Federal jursidiction for the said cross-claims under the Securities Exchange Act of 1934 and the Rules promulgated thereunder and, accordingly, there is no pendent jurisdiction of any alleged claim not based on the Securities Exchange Act of 1934.

AS AND FOR A TWELFTH AFFIRMATIVE DEFENSE

31. Upon information and belief, if it should be found upon a trial of this action that the plaintiffs and/or Empire or any party thereof suffered any damage by reason of the matters alleged in the complaint and/or in Empire's cross-claims herein, such damage would not have resulted from any acts, omissions, knowledge or conduct on the part of Goldberg, but would have been caused by the acts, errors, omissions, fraud, collusion, negligence, wrongdoing, breach of fiduciary obligation and other acts and omissions on the part of Empire and the various parties thereof, and/or the Sitomer firm, and/or the Partners thereof and/or Aschknazy, without any acts, errors or omissions, knowledge thereof or participation therein by Goldberg.

AS AND FOR A THIRTEENTH AFFIRMATIVE DEFENSE

32. Empire and the various parties thereof may not have any recovery herein against Goldberg in that, among other things,

upon information and belief, neither Empire nor the various parties thereof nor the Company or its various officers or directors ever relied, in good faith or otherwise, upon the Sitomer firm and/or the Partners thereof and/or Goldberg.

AS AND FOR A FOURTEENTH AFFIRMATIVE DEFENSE

33. There at no time existed any attorney-client relationship between Goldberg and Empire or the various parties thereof. Consequently, neither Empire nor any of the parties thereof could have relied or did rely in any way upon Goldberg and neither Empire nor any of the parties thereof may recover against Goldberg for any of the matters alleged in Empire's cross-claims herein.

AS AND FOR A FIFTEENTH AFFIRMATIVE DEFENSE

34. Goldberg did not become associated with the Sitomer firm until November 15, 1971 and resigned from his association with the Sitomer firm on January 21, 1973. Consequently, Goldberg is not and cannot be held liable to Empire or any of the parties thereof by reason of any acts, errors or omissions alleged in Empire's cross-claims which occurred prior to November 15, 1971 or subsequent to January 21, 1973.

AS AND FOR A SIXTEENTH AFFIRMATIVE DEFENSE

35. If Empire or any of the parties thereof have been or will be injured or damaged as alleged in Empire's cross-claims herein, upon information and belief, such injury and damage were or will be caused, in whole or in part, or were contributed to by reason of the acts, errors, omissions, carelessness, negligence, or want of care on the part of Empire and the various parties thereof and not through any acts, errors, omissions, negligence, carelessness or want of care on the part of Goldberg; and if any acts, errors, omissions, carelessness, negligence or

want of care other than that of Empire or the various parties thereof caused or contributed to said alleged injury and damage, it was the acts, errors, omission, carelessness, negligence or want of care on the part of some other party or person, firm or corporation, his, its or their agents, servants or employees over whom Goldberg had no control and for whose acts, errors, omissions, carelessness, negligence or want of care Goldberg was not and is not responsible or liable.

AS AND FOR A FIRST CROSS-CLAIM AGAINST THE SITOMER FIRM AND PARTNERS THEREOF, JOINTLY AND SEVERALLY

36. By agreement dated October 29, 1971, the Sitomer firm and the Partners thereof jointly and severally agreed to indemnify Goldberg and to hold him harmless for any debts or other obligations of the Sitomer firm for which Goldberg might be called upon to pay, whether by legal action, judgment or otherwise.

37. In the event of any recovery or judgment in favor of Empire or any of the parties thereof against Goldberg on any of Empire's cross-claims herein, the Sitomer firm and the Partners thereof will be obligated to indemnify Goldberg and hold him harmless therefor, jointly and severally, for all and every part thereof, including Goldberg's reasonable attorneys' fees and expenses for and in connection with his defense of this action.

AS AND FOR A SECOND CROSS-CLAIM AGAINST THE SITOMER FIRM AND THE PARTNERS THEREOF AND FOR A FIRST CROSS-CLAIM AGAINST ASCHKENAZY

38. If Empire or any of the parties thereof were or will be damaged or caused to be damaged by reason of the matters

alleged in Empire's cross-claims herein and such damage was not caused or contributed to by the acts, errors or omissions on the part of Empire or any of the parties thereof, then they were caused by the acts, errors and omissions by or on the part of the Sitomer firm and/or the Partners thereof and/or Aschkenazy without any acts, errors or omissions on the part of Goldberg contributing thereto.

39. In the event of any recovery or judgment in favor of Empire or any of the parties thereof against Goldberg on any of Empire's cross-claims herein, Goldberg will be damaged and injured thereby and will be entitled to be indemnified therefor in whole or in part, by the Sitomer firm and/or the Partners thereof and/or by Aschkenazy and all or some of them, together with Goldberg's reasonable attorneys' fees and expenses for and in connection with his defense of this action.

AS AND FOR A THIRD CROSS-CLAIM AGAINST THE SITOMER FIRM AND THE PARTNERS THEREOF AND FOR A SECOND CROSS-CLAIM AGAINST ASCHKENAZY

40. In the event of any recovery or judgment in favor of Empire or any of the parties thereof against Goldberg on any of Empire's cross-claims herein, Goldberg will be entitled to contribution from and by the Sitomer firm and/or the Partners thereof and/or Aschkenazy and/or some or all of them.

WHEREFORE, additional defendant Stuart C. Goldberg demands judgment herein dismissing the cross-claims of defendants Empire Fire and Marine Insurance Company, Gary O. Gross, Yale J. Kaplan, Francis J. Kratky, Nick Lalich, Lester C. Swick, M.M. Jennings, Jr., Robert A. Phillips, Marilyn P. Kaplan, Jo Ellen Kratky, Jennings Agency, Inc., William D. Brecht, Shelden J. Gensler, Irvin E. Schermer, Frank E. Landis, John Shelby, Florence Shelby

and Lettie Swick, together with the costs and disbursements of this action and, in the event of any recovery or judgment in favor of the aforesaid defendants or any of them on any or all of their cross-claims against additional defendant Stuart C. Goldberg, additional defendant Stuart C. Goldberg demands judgment over and against defendants Sitomer, Sitomer & Porges, Alvin Lester Sitomer, Stephen Joel Sitomer, Robert E. Porges and additional defendant Jacob Aschkenazy, jointly and severally and each and all or some of them for indemnity and/or contribution for any such recovery or judgment in favor of defendants Empire Fire and Marine Insurance Company, Gary O. Gross, Yale J. Kaplan, Francis J. Kratky, Nick Lalich, Lester C. Swick, M.M. Jennings, Jr., Robert A. Phillips, Marilyn P. Kaplan, Jo Ellen Kratky, Jennings Agency, Inc., William D. Brecht, Shelden J. Gensler, Irvin E. Schermer, Frank E. Landis, John Shelby, Florence Shelby and Lettie E. Swick or any of them, together with costs and disbursements of this action and together with additional defendant

Answer of Additional Defendant Goldberg.

Stuart C. Goldberg's reasonable attorneys' fees and expenses for and in connection with the defense of this action.

HART & HUME

By _____
A Member of the Firm
Attorneys for Additional Defendant
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Tel.: (212) 686-0920

WORMSER, KIELY, ALESSANDRONI,
MAHONEY & McCANN

By _____
A Member of the Firm
Co-Counsel for Additional Defendant
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Amended Answer of Additional Defendant Goldberg to Cross-Claim of Defendants Empire et al and Cross Claims.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

HERBERT FEDERMAN, et ano,

Plaintiffs,

-against-

EMPIRE FIRE AND MARINE INSURANCE COMPANY, et al.,

Defendants.

-and-

STUART C. GOLDBERG and JACOB ASCHKENAZY,

Additional Defendants on Cross-Claims.

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ADDITIONAL DEFENDANT GOLDBERG DEMANDS TRIAL BY JURY

73 Civ. 4516
(L.F.M.)

AMENDED ANSWER OF ADDITIONAL DEFENDANT GOLDBERG TO CROSS-CLAIMS OF DEFENDANTS EMPIRE, ET AL. AND CROSS-CLAIMS.

Additional defendant Stuart C. Goldberg ("Goldberg"), by Hart & Hume and Wormser, Kiely, Allessandroni, Mahoney & McCann, his attorneys, for his answer to the cross-claims of defendant Empire Fire and Marine Insurance Company ("the Company") and defendants Gary O. Gross, Yale J. Kaplan, Francis J. Kratky, Nick Lalich, Lester C. Swick, M.M. Jennings, Jr., Robert A. Phillips, Marilyn P. Kaplan, Jo Ellen Kratky, Jennings Agency, Inc., William D. Brecht, Shelden J. Gensler, Irvin E. Schermer, Frank E. Landis, John Shelby, Florence Shelby and Lettie E. Swick (all of the foregoing and the Company hereinafter, collectively, "Empire"), alleges as follows:

AS TO EMPIRE'S FIRST CROSS-CLAIM

1. Denies knowledge or information thereof sufficient to form a belief as to each and every allegation contained in paragraph numbered "27", except admits that the law firm of Sitomer,

Sitomer & Porges ("the Sitomer firm") was a law firm engaged in the practice of law in New York.

2. Denies each and every allegation contained in the paragraph numbered "28" except admits, upon information and belief, that Alvin L. Sitomer, Stephen J. Sitomer and Robert E. Porges ("the Partners") were partners in the Sitomer firm between November 15, 1971 and January 21, 1973 and specifically denies that Goldberg was a partner in the Sitomer firm but admits that he was associated with the Sitomer firm pursuant to a certain written agreement (to which Goldberg begs leave to refer for the terms, conditions and contents thereof) until January 21, 1973.

3. Denies knowledge or information thereof sufficient to form a belief as to each and every allegation contained in paragraph numbered "29" except admits, upon information and belief, that in or about September, 1971 the Company entered into an arrangement with the Sitomer firm and agreed to pay the Sitomer firm for certain services in connection therewith.

4. Denies knowledge or information thereof sufficient to form a belief as to each and every allegation contained in the paragraph numbered "30", except admits, upon information and belief, that the Sitomer firm and the Partners and additional defendant Jacob Aschkenazy ("Aschkenazy") participated in the preparation and filing of the registration statement and prospectus with the Securities & Exchange Commission ("SEC"), referred to in the complaint.

5. Denies knowledge or information thereof sufficient to form a belief as to each and every allegation contained in

the paragraph numbered "31", except admits, upon information and belief, that between November 15, 1971 and January 21, 1973, Aschkenazy was employed by or was a partner in the Sitomer firm, worked extensively on the offering of the Empire stock in issue in this action and that his name appeared on the cover page of the registration statement.

6. Denies each and every allegation contained in the paragraph numbered "32" and further denies that there ever was any attorney-client relationship between Goldberg and Empire or any of them.

7. Denies knowledge or information thereof sufficient to form a belief as to each and every allegation contained in the paragraphs numbered "33" and "34", except denies, upon information and belief, that Empire or any of them ever relied upon the Sitomer firm or Goldberg for any purpose as alleged in Empire's cross-claims herein.

8. Denies each and every allegation contained in the paragraphs numbered "35" and "36".

AS TO EMPIRE'S SECOND CROSS-CLAIM

9. Denies and admits, as above, each and every allegation incorporated by reference in the paragraph numbered "37".

10. Denies each and every allegation contained in the paragraph numbered "38".

AS TO EMPIRE'S THIRD CROSS-CLAIM

11. Denies and admits, as above, each and every allegation incorporated by reference in the paragraph numbered "39".

12. Denies knowledge or information sufficient to form a belief as to each and every allegation contained in the paragraphs numbered "40" and "41", except denies upon information and belief, that Empire or any of them ever relied upon the Sitomer firm or Goldberg for any purpose alleged in Empire's cross-claims herein.

AS TO EMPIRE'S FOURTH CROSS-CLAIM

13. Denies and admits, as above, each and every allegation incorporated by reference in the paragraph numbered "42".

14. Denies knowledge or information thereof sufficient to form a belief as to each and every allegation incorporated by reference in the paragraph numbered "43", except denies, upon information and belief, that Empire or any of them ever relied upon the Sitomer firm or Goldberg for any purpose alleged in Empire's cross-claims herein.

AS TO EMPIRE'S FIFTH CROSS-CLAIM

15. Denies and admits, as above, each and every allegation incorporated by reference in the paragraph numbered "44".

16. Denies knowledge or information thereof sufficient to form a belief as to each and every allegation contained in the paragraph numbered "45", except denies, upon information and belief, that Empire or any of them ever relied upon the Sitomer firm or Goldberg for any purpose alleged in Empire's cross-claims herein.

AS AND FOR A FIRST AFFIRMATIVE DEFENSE

17. Empire's cross-claims fail to state a claim upon which relief can be granted against Goldberg.

AS AND FOR A SECOND AFFIRMATIVE DEFENSE

18. Any claims or causes of action which Empire has or may have had against Goldberg by reason of the matters alleged in Emprie's cross-claims herein and any of them are barred by the Statutes of Limitations applicablethereto.

AS AND FOR A THIRD AFFIRMATIVE DEFENSE

19. Upon information and belief, Empire and the various parties thereof were knowing participants in any material misstatements, omission, fraud, collusion, negligence, wrongdoing, breach of fiduciary obligation and the other acts, errors or omissions alleged in the complaint and in Empire's cross-claims herein without any participation therein or knowledge thereof by Goldberg.

20. By virtue thereof under the Federal Securities Laws, common law and in equity Empire and the various parties thereof may not have any recovery herein against Goldberg.

AS AND FOR A FOURTH AFFIRMATIVE DEFENSE

21. If the allegations of the complaint and Empire's cross-claims were true (which latter Goldberg denies) Empire and the various parties thereof would be and are barred from any recovery against Goldberg in that, among other things, judicial enforcement of Empire's cross-claims against Goldberg would be and is contrary to the public policy embodied in the Federal Securities Laws, common law and in equity in that, among other things, Empire and the various parties thereof were actively involved and participated in the various acts, errors and omis-

sions alleged in the complaint and in Empire's cross-claims herein with full knowledge thereof and without any participation therein or knowledge thereof by Goldberg.

AS AND FOR A FIFTH AFFIRMATIVE DEFENSE

22. If the allegations contained in the complaint and Empire's cross-claims were true (which latter Goldberg denies) Empire and the various parties thereof would be and are barred from any recovery against Goldberg in that, among other things, Empire and the various parties thereof or all or some of them were in pari delicto with the Sitomer firm and/or the Partners thereof and/or Aschkenazy in the commission thereof and in connection with which Goldberg was not a party or involved therein or had knowledge thereof.

AS AND FOR A SIXTH AFFIRMATIVE DEFENSE

23. If the allegations contained in the complaint and Empire's cross-claims were true (which latter Goldberg denies), Empire and the various parties thereof would be and are barred from any recovery against Goldberg herein in that, among other things, Empire, the Company and its officers and directors and all or some of them, had actual or imputed knowledge of the matters alleged to constitute violations of the Federal Securities Laws at or prior to the effective date of the registration statement and prospectus involved in this action without any participation therein or knowledge thereof by Goldberg.

AS AND FOR A SEVENTH AFFIRMATIVE DEFENSE

24. If the allegations contained in the complaint and Empire's cross-claims were true (which latter Goldberg denies),

Empire and the various parties thereof would be and are barred from any recovery against Goldberg in that, among other things, Empire and the various parties thereof would have profited and will profit from their own wrongdoing and would be and will be unjustly enriched by any recovery against Goldberg herein.

AS AND FOR AN EIGHTH AFFIRMATIVE DEFENSE

25. If the allegations contained in the complaint and Empire's cross-claims were true (which latter Goldberg denies), Empire and the various parties thereof would be and are barred from any recovery against Goldberg herein in that, among other things, Empire and the various parties thereof did fail or would have failed to exercise reasonable diligence to discover the existence of those matters alleged to constitute violations of the Federal Securities Laws and otherwise.

AS AND FOR A NINTH AFFIRMATIVE DEFENSE

26. Goldberg is not and cannot be liable to Empire and the various parties thereof in that, among other things, Goldberg had no reasonable ground to believe and did not believe at the time the registration statement and prospectus involved herein became effective, that any of the statements contained in said registration statement and prospectus were untrue or that there was any omission to state a material fact required to be stated therein or necessary to make any statement therein not misleading or that said registration statement and prospectus did not fairly represent the true terms and conditions of the public offering involved or of the material facts relating thereto.

AS AND FOR A TENTH AFFIRMATIVE DEFENSE

27. Goldberg is not and cannot be held liable to Empire or any of the parties thereof in any amount in that, among other things, Empire, in collusion with the Sitomer firm, the Partners thereof and/or Aschkenazy, deliberately, knowingly and wilfully concealed from Goldberg certain facts and information regarding matters which should have been included in the registration statement to make the same not misleading and to fairly represent the true terms and conditions of the public offering involved or of material facts relating thereto or which would have revealed that certain of the statements contained in the registration statement were untrue or that there were omissions in said registration statement.

28. Upon becoming aware of certain of the aforementioned facts which had been concealed from him as aforesaid, Goldberg endeavored to persuade the Sitomer firm, the Partners thereof and

Aschkenazy and, through them, Empire and the various parties thereof, to take such remedies and corrective steps as were necessary and proper in the premises, which they refused to do.

29. Upon such refusal, Goldberg immediately resigned from his association with the Sitomer firm and took such steps as were necessary and proper in the premises to bring the matter to the attention of the appropriate authorities.

AS AND FOR AN ELEVENTH AFFIRMATIVE DEFENSE

30. This court lacks jurisdiction of the subject matter of Empire's cross-claims herein in that there is no Federal jursidiction for the said cross-claims under the Securities Exchange Act of 1934 and the Rules promulgated thereunder and, accordingly, there is no pendent jurisdiction of any alleged claim not based on the Securities Exchange Act of 1934.

AS AND FOR A TWELFTH AFFIRMATIVE DEFENSE

31. Upon information and belief, if it should be found upon a trial of this action that the plaintiffs and/or Empire or any party thereof suffered any damage by reason of the matters alleged in the complaint and/or in Empire's cross-claims herein, such damage would not have resulted from any acts, omissions, knowledge or conduct on the part of Goldberg, but would have been caused by the acts, errors, omissions, fraud, collusion, negligence, wrongdoing, breach of fiduciary obligation and other acts and omissions on the part of Empire and the various parties thereof, and/or the Sitomer firm, and/or the Partners thereof and/or Aschknazy, without any acts, errors or omissions, knowledge thereof or participation therein by Goldberg.

AS AND FOR A THIRTEENTH AFFIRMATIVE DEFENSE

32. Empire and the various parties thereof may not have any recovery herein against Goldberg in that, among other things, upon information and belief, neither Empire nor the various parties thereof nor the Company or its various officers or directors ever relied, in good faith or otherwise, upon the Sitomer firm and/or the Partners thereof and/or Goldberg.

AS AND FOR A FOURTEENTH AFFIRMATIVE DEFENSE

33. There at no time existed any attorney-client relationship between Goldberg and Empire or the various parties thereof. Consequently, neither Empire nor any of the parties thereof could have relied or did rely in any way upon Goldberg and neither Empire nor any of the parties thereof may recover against Goldberg for any of the matters alleged in Empire's cross-claims herein.

AS AND FOR A FIFTEENTH AFFIRMATIVE DEFENSE

34. Goldberg did not become associated with the Sitomer firm until November 15, 1971 and resigned from his association with the Sitomer firm on January 21, 1973. Consequently, Goldberg is not and cannot be held liable to Empire or any of the parties thereof by reason of any acts, errors or omissions alleged in Empire's cross-claims which occurred prior to November 15, 1971 or subsequent to January 21, 1973.

AS AND FOR A SIXTEENTH AFFIRMATIVE DEFENSE

35. If Empire or any of the parties thereof have been or will be injured or damaged as alleged in Empire's cross-claims herein, upon information and belief, such injury and damage were

or will be caused, in whole or in part, or were contributed to by reason of the acts, errors, omissions, carelessness, negligence, or want of care on the part of Empire and the various parties thereof and not through any acts, errors, omissions, negligence, carelessness or want of care on the part of Goldberg; and if any acts, errors, omissions, carelessness, negligence or want of care other than that of Empire or the various parties thereof caused or contributed to said alleged injury and damage, it was the acts, errors, omission, carelessness, negligence or want of care on the part of some other party or person, firm or corporation, his, its or their agents, servants or employees over whom Goldberg had no control and for whose acts, errors, omissions, carelessness, negligence or want of care Goldberg was not and is not responsible or liable.

AS AND FOR A FIRST CROSS-CLAIM
AGAINST THE SITOMER FIRM AND
PARTNERS THEREOF, JOINTLY AND
SEVERALLY

36. By agreement dated October 29, 1971, the Sitomer firm and the Partners thereof jointly and severally agreed to indemnify Goldberg and to hold him harmless for any debts or other obligations of the Sitomer firm for which Goldberg might be called upon to pay, whether by legal action, judgment or otherwise.

37. In the event of any recovery or judgment in favor of Empire or any of the parties thereof against Goldberg on any of Empire's cross-claims herein, the Sitomer firm and the Partners thereof will be obligated to indemnify Goldberg and hold him

harmless therefor, jointly and severally, for all and every part thereof, including Goldberg's reasonable attorneys' fees and expenses for and in connection with his defense of this action.

AS AND FOR A SECOND CROSS-CLAIM AGAINST THE SITOMER FIRM AND THE PARTNERS THEREOF AND FOR A FIRST CROSS-CLAIM AGAINST ASCHKENAZY

38. If Empire or any of the parties thereof were or will be damaged or caused to be damaged by reason of the matters alleged in Empire's cross-claims herein and such damage was not caused or contributed to by the acts, errors or omissions on the part of Empire or any of the parties thereof, then they were caused by the acts, errors and omissions by or on the part of the Sitomer firm and/or the Partners thereof and/or Aschkenazy without any acts, errors or omissions on the part of Goldberg contributing thereto.

39. In the event of any recovery or judgment in favor of Empire or any of the parties thereof against Goldberg on any of Empire's cross-claims herein, Goldberg will be damaged and injured thereby and will be entitled to be indemnified therefor in whole or in part, by the Sitomer firm and/or the Partners thereof and/or by Aschkenazy and all or some of them, together with Goldberg's reasonable attorneys' fees and expenses for and in connection with his defense of this action.

AS AND FOR A THIRD CROSS-CLAIM AGAINST THE SITOMER FIRM AND THE PARTNERS THEREOF AND FOR A SECOND CROSS-CLAIM AGAINST ASCHKENAZY

40. In the event of any recovery or judgment in favor of Empire or any of the parties thereof against Goldberg on any

of Empire's cross-claims herein, Goldberg will be entitled to contribution from and by the Sitomer firm and/or the Partners thereof and/or Aschkenazy and/or some or all of them.

AS AND FOR A COUNTER-CLAIM AGAINST DEFENDANTS EMPIRE, GARY O. GROSS, YALE J. KAPLAN, ROBERT A PHILLIPS, FRANCIS J. KRATKY, NICK LALICH, LESTER C. SWICK AND M. M. JENNINGS, JR.

41. Upon information and belief, defendant Empire Fire and Marine Insurance Company ("the Company") is, and was at all times hereinafter mentioned, a corporation organized and existing under the laws of the State of Nebraska.

42. Upon information and belief, defendants Gary O. Gross, Yale J. Kaplan, Robert A. Phillips, Francis J. Kratky, Nich Lalich, Lester C. Swick and M.M. Jennings, Jr. (hereinafter "the Empire directors") were directors of Empire at all times relevant hereto.

43. Upon information and belief, the Company and the Empire directors were at all times aware of the arrangements between the Company and the Sitomer firm and the omissions from the Empire registration statement and prospectus alleged in paragraph "7", "17" and "18" of the complaint, and of the materiality of such arrangements and omissions, and withheld knowledge of such matters from Goldberg, in breach of their duty to deal with him fairly and honestly, and without negligence on his part.

44. As a result of the foregoing, it has been made to appear, contrary to the truth, that Goldberg was a participant in the wrongs alleged in the complaint, and Goldberg has thereby

been caused to suffer damage to his reputation as a lawyer, in an amount not less than $850,000, as well as by loss of employment, in an amount of at least $16,875, and by being required to incur counsel fees, in an amount which will exceed $15,000.

AS AND FOR A FOURTH
CROSS-CLAIM AGAINST
THE SITOMER FIRM AND
THE PARTNERS THEREOF
AND FOR A THIRD CROSS-
CLAIM AGAINST ASCHKENAZY

45. Defendants Alvin Lester Sitomer, Stephen Joel Sitomer and Robert E. Porges are, and were at all times hereinafter mentioned, partners engaged in the practice of law as Sitomer, Sitomer & Porges, and additional defendant on cross-claims Jacob Aschkenazy was, at all times relevant hereto, associated with Sitomer, Sitomer & Porges.

46. Additional defendant on cross-claims Goldberg was associated with Sitomer, Sitomer and Porges between November 15, 1971 and January 21, 1973.

47. Sitomer, Sitomer & Porges and its partners and Aschkenazy were at all times aware of the arrangements between the Company and the Sitomer firm and the omissions from the Empire registration statement and prospectus alleged in paragraphs "7", "17" and "18" of the complaint, and of the materiality of such arrangements and omissions, and withheld knowledge of such matters from Goldberg, in breach of their duty to deal with him fairly and honestly, and without negligence on his part.

48. Additional defendant on cross-claims Goldberg repeats and realleges the allegations of paragraph "44" of this answer.

Amended Answer.

WHEREFORE, additional defendant Stuart C. Goldberg demands judgment herein dismissing the cross-claims of defendants Empire Fire and Marine Insurance Company, Gary O. Gross, Yale J. Kaplan, Francis J. Kratky, Nick Lalich, Lester C. Swick, M.M. Jennings, Jr., Robert A. Phillips, Marilyn P. Kaplan, Jo Ellen Kratky, Jennings Agency, Inc., William D. Brecht, Shelden J. Gensler, Irvin E. Schermer, Frank E. Landis, John Shelby, Florence Shelby and Lettie E. Swick, together with the costs and disbursements of this action and, in the event of any recovery or judgment in favor of the aforesaid defendants or any of them on any or all of their cross-claims against additional defendant Stuart C. Goldberg, additional defendant Stuart C. Goldberg demands judgment over and against defendants Sitomer, Sitomer & Porges, Alvin Lester Sitomer, Stephen Joel Sitomer, Robert E. Porges and additional defendant Jacob Aschkenazy, jointly and severally and each and all or some of them for indemnity and/or contribution for any such recovery or judgment in favor of defendants Empire Fire and Marine Insurance Company, Gary O. Gross, Yale J. Kaplan, Francis J. Kratky, Nick Lalich, Lester C. Swick, M.M. Jennings, Jr., Robert A. Phillips, Marilyn P. Kaplan, Jo Ellen Kratky, Jennings Agency, Inc., William D. Brecht, Shelden J. Gensler, Irvin E. Schermer, Frank E. Landis, John Shelby, Florence Shelby and Lettie E. Swick or any of them, and additional defendant on cross-claims Stuart C. Goldberg demands judgment on his counterclaim against defendants Empire Fire and Marine Insurance Company, Gary O. Gross, Yale J. Kaplan, Robert A. Phillips, Francis J. Kratky, Nick Lalich, Lester C. Swick and M.M. Jennings, Jr. and his fourth cross-claim against defendants Sitomer, Sitomer & Porges, Alvin Lester Sitomer, Stephen

Amended Answer.

Joel Sitomer and Robert E. Porges and his third cross-claim against additional defendant on cross-claims Jacob Aschkenazy in the sum of at least $881,875, with interest, together with costs and disbursements of this action and together with additional defendant Stuart C. Goldberg's reasonable attorneys' fees and expenses for and in connection with the defense of this action.

HART & HUME

By _____
A Member of the Firm
Attorneys for Additional Defendant
Stuart C. Goldberg
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WORMSER, KIELY, ALESSANDRONI,
MAHONEY & McCANN

By _____
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Co-Counsel for Additional Defendant
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Tel.: (212) 889-8480

Reply to Counterclaim.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- -X

HERBERT FEDERMAN, et ano.,	:	
Plaintiffs,	:	
-against-	:	73 Civ. 4516 (L.F.M.)
EMPIRE FIRE AND MARINE INSURANCE COMPANY, et al.,	:	REPLY TO COUNTERCLAIM
Defendants.	:	

- -X

Defendants Empire Fire and Marine Insurance Company, Gary O. Gross, Yale J. Kaplan, Robert A. Phillips, Francis J. Kratky, Nick Lalich, Lester C. Swick and M. M. Jennings, Jr., replying to the counterclaim asserted against them in the amended answer of additional defendant Stuart C. Goldberg:

1. Deny each and every allegation contained in paragraph 42 of Goldberg's amended answer, except admit that some or all of the above-mentioned defendants acted as directors of Empire at various times and/or were selling shareholders in connection with the offering of Empire's stock pursuant to a registration statement which became effective on May 31, 1972.

2. Deny each and every allegation contained in paragraph 43 of Goldberg's amended answer, except admit that the Sitomer firm was retained to render legal services in connection with the offering of Empire's stock.

Reply to Counterclaim.

3. Deny each and every allegation contained in paragraph 44 of Goldberg's amended answer.

AS A DEFENSE, ALLEGE:

4. The counterclaim fails to state a claim upon which relief can be granted.

WHEREFORE, defendants Empire Fire and Marine Insurance Company, Gary O. Gross, Yale J. Kaplan, Robert A. Phillips, Francis J. Kratky, Nick Lalich, Lester C. Swick and M. M. Jennings, Jr., request judgment dismissing the counterclaim, together with costs and disbursements.

ARANOW, BRODSKY, BOHLINGER, BENETAR, & EINHORN

By Anthony L. Ferrigno
A Member of the Firm

Attorneys for defendants Empire Fire and Marine Insurance Company, Gary O. Gross, Yale J. Kaplan, Robert A. Phillips, Francis J. Kratky, Nick Lalich, Lester C. Swick, M. M. Jennings, Jr.,
469 Fifth Avenue
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212- 889-1470

Answer to Cross-Claim.

RECEIVED
JUL 3 1974
HART & HUME

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

HERBERT FEDERMAN, et ano.,

Plaintiffs,

-against-

73 Civ. 4516 (LFM)

EMPIRE FIRE AND MARINE INSURANCE COMPANY, et al.,

Defendants.

(DEFENDANTS DEMAND A TRIAL BY JURY)

-and-

STUART C. GOLDBERG and JACOB ASCHKENASY,

Additional Defendants on Cross-Claims.

ANSWER TO CROSS-CLAIM

----------X

The Defendant-SITOMER, SITOMER & PORGES; ALVIN L. SITOMER; STEPHEN J. SITOMER; ROBERT E. PORGES; and JACOB ASCHKENASY, by and through their attorneys D'AMATO, COSTELLO & SHEA, as and for their Answer to the Cross-Claim of the Additional Defendant-STUART C. GOLDBERG, allege upon information and belief, as follows:

ANSWERING THE FIRST CROSS-CLAIM

1. Denies any knowledge or information sufficient to form a belief with regard to each and every allegation contained in paragraph "36" of the Cross-Claim.

2. Denies any knowledge or information sufficient to form a belief with regard to each and every allegation contained in paragraph "37" of the Cross-Claim.

ANSWERING THE SECOND CROSS-CLAIM

3. Denies each and every allegation contained in paragraph "38" of the Cross-Claim.

4. Denies each and every allegation contained in paragraph "39" of the Cross-Claim.

ANSWERING THE THIRD CROSS-CLAIM

5. Denies each and every allegation contained in paragraph "40" of the Cross-Claim.

AS AND FOR A FIRST AFFIRMATIVE DEFENSE AS AGAINST THE CROSS-CLAIMS OF THE ADDITIONAL DEFENDANT-STUART C. GOLDBERG, THE DEFENDANTS, SITOMER, SITOMER & PORGES, ALVIN L. SITOMER, STEPHEN J. SITOMER, ROBERT E. PORGES AND JACOB ASCHKENASY ALLEGE:

A. The Cross-Claim of the Additional Defendant-STUART C. GOLDBERG fails, as a matter of law, to state any grounds upon which relief can and/or should be granted by this Court, and as a consequence of the foregoing, the Cross-Claims should be dismissed in all respects.

AS AND FOR A SECOND AFFIRMATIVE DEFENSE

B. The causes of action, events, and claims, etc. set forth in the Cross-Claims of the Additional Defendant-STUART C. GOLDBERG, are barred by the applicable Statute of Limitations and/or the equitable Doctrine of Laches, and as a consequence of the foregoing, the Cross-Claims should be dismissed in all respects.

AS AND FOR A THIRD
AFFIRMATIVE DEFENSE

C. If any damages were sustained by the Plaintiff HERBERT FEDERMAN and/or any members of his putative class and/or the Additional Defendant-STUART C. GOLDBERT, which is denied, then all such damages will have been caused, brought about, in whole or material part, by the acts, ommissions, errors, fraud, collusion, negligence, wrong-doing, breach of fiduciary obligation, etc. on the part of the Plaintiff HERBERT FEDERMAN and the Additional Defendant STUART C. GOLDBERG, without any similar acts on the part of the Defendants, SITOMER, SITOMER & PORGES, ALVIN L. SITOMER, STEPHEN J. SITOMER, ROBERT E. PORGES and JACOB ASCHKENASY contributing thereto, and as a consequence of the foregoing, both the Complaint of the Plaintiff, and the Cross-Claims of the Additional Defendant STUART C. GOLDBERG, should be dismissed in all respects.

AS AND FOR A FOURTH
AFFIRMATIVE DEFENSE

D. The Additional Defendant-STUART C. GOLDBERG, is not entitled, as a matter of law, to either indemnity and/or contribution under the Securities Act, and as a consequence of the foregoing, the Cross-Claims should be dismissed in all respects.

WHEREFORE, it is respectfully prayed that the Defendants SITOMER, SITOMER, & PORGES, ALVIN L. SITOMER, STEPHEN J. SITOMER, ROBERT E. PORGES, and JACOB ASCHKENASY have judgment

Answer to Cross-Claim.

dismissing the Cross-Claims of the Additional Defendant-STUART C. GOLDBERG, and be awarded interest, disbursements, and reasonable attorney's fees incurred in the defense of this action.

D'AMATO, COSTELLO & SHEA

By _____
A Member of the Firm
Attorneys for Defendants Sitomer, Sitomer, & Porges, et al.
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Reply to Counterclaim.

RECEIVED
HAKI & HUME

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- -X

HERBERT FEDERMAN, et ano., :

Plaintiffs, :

-against- : 73 Civ. 4516 (L.F.M.)

EMPIRE FIRE AND MARINE INSURANCE COMPANY, et al., : REPLY TO COUNTERCLAIM

Defendants. :

- -X

Defendants Empire Fire and Marine Insurance Company, Gary O. Gross, Yale J. Kaplan, Robert A. Phillips, Francis J. Kratky, Nick Lalich, Lester C. Swick and M. M. Jennings, Jr., replying to the counterclaim asserted against them in the amended answer of additional defendant Stuart C. Goldberg:

1. Deny each and every allegation contained in paragraph 42 of Goldberg's amended answer, except admit that some or all of the above-mentioned defendants acted as directors of Empire at various times and/or were selling shareholders in connection with the offering of Empire's stock pursuant to a registration statement which became effective on May 31, 1972.

2. Deny each and every allegation contained in paragraph 43 of Goldberg's amended answer, except admit that the Sitomer firm was retained to render legal services in connection with the offering of Empire's stock.

3. Deny each and every allegation contained in paragraph 44 of Goldberg's amended answer.

AS A DEFENSE, ALLEGE:

4. The counterclaim fails to state a claim upon which relief can be granted.

WHEREFORE, defendants Empire Fire and Marine Insurance Company, Gary O. Gross, Yale J. Kaplan, Robert A. Phillips, Francis J. Kratky, Nick Lalich, Lester C. Swick and M. M. Jennings, Jr., request judgment dismissing the counterclaim, together with costs and disbursements.

ARANOW, BRODSKY, BOHLINGER, BENETAR, & EINHORN

By Anthony L. Terrizzi
A Member of the Firm

Attorneys for defendants Empire Fire and Marine Insurance Company, Gary O. Gross, Yale J. Kaplan, Robert A. Phillips, Francis J. Kratky, Nick Lalich, Lester C. Swick, M. M. Jennings, Jr.,
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MEMORANDUM DECISION AND ORDER OF MACMAHON, D. J., DATED AUGUST 23, 1973, DISMISSING THE ACTION DISQUALIFYING PLAINTIFFS' ATTORNEYS, PERMANENTLY ENJOINING PLAINTIFFS' ATTORNEYS AND GOLDBERG, ETC.

U.S. DISTRICT COURT
FILED
AUG 23 1973
S. D. OF N. Y.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

DIETRICH MEYERHOFER et al.,

Plaintiffs,

-against-

EMPIRE FIRE AND MARINE INSURANCE COMPANY et al.,

Defendants.

----------x

73 Civ. 1940-LFM

MEMORANDUM

MacMAHON, District Judge.

Plaintiffs move under Rule 56, Fed.R.Civ.P., and Civil Rule 11A of this court for an order declaring that this action be maintained as a class action. Invoking Canons 4 and 9 of the Code of Professional Responsibility and the supervisory power of this court, the individual defendants Empire Fire and Marine Insurance Company (Empire) and Sitomer, Sitomer & Porges (Sitomer firm) cross-move for an order disqualifying plaintiffs' attorneys from representing plaintiffs in this action or associating with any other attorney in the prosecution of this action; enjoining plaintiffs,

MEMORANDUM DECISION AND ORDER OF MACMAHON, D. J., DATED AUGUST 23, 1973, DISMISSING THE ACTION DISQUALIFYING PLAINTIFFS' ATTORNEYS, PERMANENTLY ENJOINING PLAINTIFFS' ATTORNEYS AND GOLDBERG, ETC.

their attorneys and Stuart Charles Goldberg from further disclosing confidential information regarding Empire; directing the Clerk of the court to seal that part of the file containing confidential information; dismissing this action without prejudice; and granting such other relief as the court may deem proper. We shall consider the cross-motion first.

Empire retained the Sitomer firm to draft a registration statement in connection with a public offering of Empire stock. Goldberg, a limited partner of the law firm from November 15, 1971 until January 21, 1973, was actively involved in the preparation of the statement or in the necessary background work, such as, reviewing the minutes of Empire. The registration statement for the Empire issue was dated May 31, 1972.

In January 1973, Goldberg became aware of what he felt were material omissions concerning certain compensation agreements between the Sitomer firm and Empire. Evidently, the possibility that these agreements would become public was the subject of much discussion within the Sitomer firm. Goldberg thought that full disclosure to the Securities and Exchange Commission (SEC)

was proper and obligatory. He asked his personal attorney to contact Stanley Sporkin, Deputy Director of the SEC's Division of Enforcement, explain the nature of the problem and make known Goldberg's availability to meet with the SEC to discuss the problem.

A meeting between Goldberg and SEC representatives was arranged for Monday morning, January 22, 1973. The night before this meeting, Goldberg sent telegrams to two limited partners in the Sitomer firm advising them of his immediate resignation from the firm and of his meeting with the SEC "for the purpose of making full and complete disclosure regarding the activities of the firm in regards to securities practice."

During the next week, Goldberg discussed the firm's activities with respect to the Empire registration statement and also with respect to another registration statement which the firm had been preparing. He submitted a lengthy affidavit to the SEC outlining these activities on January 26, 1973. No member of the firm participated in or appeared at these discussions notwithstanding their present claims that they intended

MEMORANDUM DECISION AND ORDER OF MACMAHON, D. J., DATED AUGUST 23, 1973, DISMISSING THE ACTION DISQUALIFYING PLAINTIFFS' ATTORNEYS, PERMANENTLY ENJOINING PLAINTIFFS' ATTORNEYS AND GOLDBERG, ETC.

to make full disclosure. The SEC has commenced an investigation of these transactions.

Empire filed its annual report with the SEC (Form 10k) on April 12, 1973. This report made public disclosure for the first time of the compensation agreements. The report was distributed to Empire's stockholders on or before April 30, 1973.

Plaintiffs filed their original complaint on May 2, 1973 asserting that the omission of the compensation agreements from the registration statement was a violation of the securities laws.[1] Service was made on that same day on the Sitomer firm and its general partners. Plaintiffs' counsel (counsel) telephoned Goldberg on May 3, 1973, informed him that an action had been commenced and that Goldberg was named as a defendant. Goldberg denied any wrongdoing and told counsel of his efforts to have the Sitomer firm make disclosure and of his own disclosure before the SEC. Counsel agreed that if Goldberg were not involved in the alleged omissions, they would move to drop Goldberg as a party defendant. Goldberg then asked if he could see a copy of the complaint without being served.

MEMORANDUM DECISION AND ORDER OF MACMAHON, D. J., DATED AUGUST 23, 1973, DISMISSING THE ACTION DISQUALIFYING PLAINTIFFS' ATTORNEYS, PERMANENTLY ENJOINING PLAINTIFFS' ATTORNEYS AND GOLDBERG, ETC.

Counsel arranged to meet Goldberg in front of counsel's office building. At this meeting on May 3, 1973 counsel requested a copy of Goldberg's SEC affidavit but he refused to disclose it until he had spoken with his own attorney and with the SEC. After discussing the matter with his attorney, Goldberg arranged to meet counsel on May 7, 1973 at counsel's office. At this meeting, he again refused to show counsel his affidavit until he had spoken with the SEC. Counsel and Goldberg then called William P. Sullivan, Special Counsel at the SEC. Mr. Sullivan stated that the SEC had no objection to disclosure of the affidavit. Goldberg then gave counsel a copy. A discussion followed.

Subsequent to this meeting, counsel moved for an order dropping Goldberg as a named defendant. We granted that motion since Goldberg had not been served and since no prejudice would accrue to any other party. Defendants now assert that their cross-motion should be granted because counsel aided and abetted a disclosure of confidential information and because counsel have failed to avoid the appearance of impropriety, in violation of Canons 4 and 9 of the Code of Professional Responsibility.

MEMORANDUM DECISION AND ORDER OF MACMAHON, D. J., DATED AUGUST 23, 1973, DISMISSING THE ACTION DISQUALIFYING PLAINTIFFS' ATTORNEYS, PERMANENTLY ENJOINING PLAINTIFFS' ATTORNEYS AND GOLDBERG, ETC.

It is the duty of the court to examine charges of unethical conduct and to supervise the conduct of its attorneys.[2] When considering such charges, courts may not rely upon the good faith of the attorneys involved, but rather must apply "a strict prophylactic rule to prevent any possibility, however slight, that confidential information acquired from a client during a previous relationship may subsequently be used to the client's disadvantage."[3]

Canon 4 provides that "a lawyer should preserve the confidences and secrets of a client." This obligation is broader than the evidentiary attorney-client privilege and "exists without regard to the nature or source of information or the fact that others share the knowledge."[4] Furthermore, the court does not stop to inquire whether any information which Goldberg or his firm may have disclosed to plaintiffs' counsel was in fact confidential, for such an inquiry would reveal the very confidences sought to be protected. All that need be shown, therefore, is that during the attorney-client relationship Goldberg had access to his client's information relevant to the issues here.[5]

MEMORANDUM DECISION AND ORDER OF MACMAHON, D. J., DATED AUGUST 23, 1973, DISMISSING THE ACTION DISQUALIFYING PLAINTIFFS' ATTORNEYS, PERMANENTLY ENJOINING PLAINTIFFS' ATTORNEYS AND GOLDBERG, ETC.

Canon 9 provides that a "lawyer should avoid even the appearance of professional impropriety." Every effort must be made, therefore, to ensure not only that the actions of lawyers are proper but also that they appear to be so. The appearance of propriety may be as necessary as the fact.[6]

Goldberg had been actively involved in the preparation of Empire's registration statement. He inspected its minute books and before going to the SEC in January 1973 inspected Empire's file. There can be no question, therefore, that Goldberg had access to client material related to the issues here. Likewise, there can be no question that he has associated with, and made disclosures to, the plaintiffs without the consent of Empire. The mere association compromises the confidences which Canon 4 seeks to protect. At the very least, when a former client is sued, he has a right to assume that his former attorneys will not voluntarily disclose what they know about the issues in litigation to the client's adversary or to his adversary's attorneys.[7] The fact that Goldberg no longer represented Empire, or even that plaintiffs had named him as a defendant, does not relieve him of his professional responsibility.[8]

MEMORANDUM DECISION AND ORDER OF MACMAHON, D. J., DATED AUGUST 23, 1973, DISMISSING THE ACTION DISQUALIFYING PLAINTIFFS' ATTORNEYS, PERMANENTLY ENJOINING PLAINTIFFS' ATTORNEYS AND GOLDBERG, ETC.

Furthermore, association with the former client's adversary gives the appearance of impropriety. All other defendants were served; Goldberg, alone, among the named defendants was not served, and it was counsel for the plaintiffs who requested that Goldberg be dropped as a defendant. However innocent the association with the former client's adversary's counsel may have been, it clearly has the appearance of impropriety.

Counsel for the plaintiffs cannot disentangle themselves from the tainted association. They agreed to meet with Goldberg and were willing, if not eager, listeners to disclosures of confidences which they knew, or should have known, were protected by the Canons of Professional Responsibility. They, thus, not only encouraged but also participated in a violation of Canon 4 and Canon 9.

Plaintiffs argue, however, that the alleged omissions and misstatements by Empire constitute, if true, a continuing criminal and civil violation of the anti-fraud provisions of the securities laws and that, therefore, Goldberg was required to reveal the information

MEMORANDUM DECISION AND ORDER OF MACMAHON, D. J., DATED AUGUST 23, 1973, DISMISSING THE ACTION DISQUALIFYING PLAINTIFFS' ATTORNEYS, PERMANENTLY ENJOINING PLAINTIFFS' ATTORNEYS AND GOLDBERG, ETC.

to the SEC by Disciplinary Rule 7-102(B)(1). That rule provides:

> "A lawyer who receives information clearly establishing that:
>
> (1) His client, has in the course of the representation, perpetrated a fraud upon a person or tribunal shall promptly call upon his client to rectify the same, and if his client refuses or is unable to do so, he shall reveal the fraud to the affected person or tribunal."

Goldberg disclosed the information to the SEC in January 1973, and in April of that year Empire disclosed the information in its annual report to stockholders which it filed with the SEC. The complaint here was thus filed on the basis of information already public. Disciplinary Rule 7-102(B)(1) requires the lawyer to reveal the fraud only if the client refuses to do so. Since the client had already revealed the omission to its stockholders and to the public, via the SEC, Goldberg had no further obligation under Disciplinary Rule 7-102(B)1) to reveal the information or to discuss the matter with plaintiffs' counsel.[9]

Plaintiffs further argue that Goldberg's disclosures could have been compelled through the discovery

process. The argument is both immaterial and premature. As we have shown, the issues raised here are broader than the attorney-client privilege and whether the disclosure of information will offend that privilege must await concrete situations during discovery or trial. Moreover, discovery is conducted within the supervision of the court. No such safeguards were available at the meetings between plaintiffs' counsel and Goldberg.

Plaintiffs also raise other arguments based on the attorney-client privilege. They attempt to show that the attorney-client privilege does not apply and therefore that there was no bar to Goldberg's meeting with plaintiffs' counsel. These arguments are inapposite, since, as we have seen, we are concerned with the broader obligations of Canons 4 and 9. We hold only that, under the circumstances shown here, the meetings between Goldberg and counsel were violative of Canons 4 and 9. We need not and do not reach any situation which may later arise where the attorney-client privilege may be in issue.

We now consider the scope of the relief. The circumstances of this case have put all parties and

MEMORANDUM DECISION AND ORDER OF MACMAHON, D. J., DATED AUGUST 23, 1973, DISMISSING THE ACTION DISQUALIFYING PLAINTIFFS' ATTORNEYS, PERMANENTLY ENJOINING PLAINTIFFS' ATTORNEYS AND GOLDBERG, ETC.

counsel in an unusual situation. The questions presented are close. Both Goldberg and counsel consulted as to the propriety of their meetings and the disclosures, and we think they acted in good faith. However, in keeping with the "strict prophylactic rule" of Emle Industries, Inc. v. Patentex, Inc., 478 F.2d 562 (2 Cir. 1973), to protect confidences and to ensure propriety and the appearance of propriety on the part of the bar, we must prevent such conduct as that shown here.

Accordingly, counsel for plaintiffs and Goldberg are enjoined and barred from acting as counsel or participating in any way with counsel for the plaintiffs in this action or in any future action against Empire involving the same transactions, occurrences, events, allegations, facts or issues, and they are further enjoined from disclosing confidential information regarding Empire to others except to comply with rulings of the court on discovery proceedings or upon trial. All other injunctive relief requested is denied.

The affidavits submitted to us in camera, specifically, Goldberg's affidavit of June 21, 1973 and Goldberg's affidavit of January 26, 1973 prepared for the SEC, shall be made a part of the record

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and sealed by the Clerk of the court.

In light of the foregoing, it becomes necessary to dismiss the complaint and this action without prejudice. Since we have dismissed the action, there is no need to consider plaintiffs' motion for an order determining this to be a class action.

So ordered.

Dated: New York, N. Y.
August 23, 1973

Lloyd F. MacMahon
LLOYD F. MacMAHON
United States District Judge

MEMORANDUM DECISION AND ORDER OF MACMAHON, D. J., DATED AUGUST 23, 1973, DISMISSING THE ACTION DISQUALIFYING PLAINTIFFS' ATTORNEYS, PERMANENTLY ENJOINING PLAINTIFFS' ATTORNEYS AND GOLDBERG, ETC.

Meyerhofer v. Empire Fire & Marine Ins. Co.
73 Civ. 1940-LFM

FOOTNOTES

1

The X firm and the general partners have attempted to show that counsel for plaintiffs had become aware of the firm's predicament through discussion with the X firm concerning the renting of a part of the firm's office space by counsel for plaintiffs. They evidently are trying to posit some breach of confidence by counsel or by a third party who acted as intermediary in the renting discussion. This has caused counter-charges and replies. Although there are evidently questions of fact here, we do not feel that a hearing is necessary since resolution of these issues is not necessary to determine the cross-motion.

2

Emle Industries, Inc. v. Patentex, Inc., 478 F.2d 562 (2d Cir. 1973); Richardson v. Hamilton Int'l Corp., 469 F.2d 1382 (3d Cir. 1972), cert. denied, 41 U.S.L.W. 3608 (U.S. May 14, 1973).

3

Emle Industries, Inc. v. Patentex, Inc., supra, 478 F.2d at 571.

4

Ethical Consideration 4-4. See Doe v. A Corp., 330 F. Supp. 1352, 1356 (S.D.N.Y. 1971), aff'd per curiam, 453 F.2d 1375 (2d Cir. 1972).

5

Emle Industries, Inc. v. Patentex, Inc., supra, 478 F.2d at 571; Richardson v. Hamilton Int'l Corp., supra; Empire Linotype School, Inc. v. United States, 143 F. Supp. 627, 632 (S.D.N.Y. 1956); T. C. Theatre Corp. v. Warner Bros. Pictures, Inc., 113 F. Supp. 265, 268, motion to reargue denied, 125 F. Supp. 233 (S.D.N.Y. 1953).

MEMORANDUM DECISION AND ORDER OF MACMAHON, D. J., DATED AUGUST 23, 1973, DISMISSING THE ACTION DISQUALIFYING PLAINTIFFS' ATTORNEYS, PERMANENTLY ENJOINING PLAINTIFFS' ATTORNEYS AND GOLDBERG, ETC.

6

Emle Industries, Inc. v. Patentex, Inc., supra, 478 F.2d at 571.

7

Ethical Considerations 4-2 and 4-5.

8

Ethical Consideration 4-6.

9

We do not consider the propriety of Goldberg's disclosures to the SEC.

Dietrich MEYERHOFER and Herbert Federman, Appellants-Appellees,
Bernson, Hoeniger, Freitag & Abbey, Appellants,
Stuart Charles Goldberg, Intervenor-Appellant,

v.

EMPIRE FIRE AND MARINE INSURANCE COMPANY et al., Appellees-Appellants,
Faulkner, Dawkins & Sullivan Securities Corp., Defendant.

Nos. 512–514, Dockets 73–2340, 73–2443, 73–2501.

United States Court of Appeals, Second Circuit.

Argued Jan. 16, 1974.

Decided June 10, 1974.

MOORE, Circuit Judge:

This is an appeal by Dietrich Meyerhofer and Herbert Federman, plaintiffs, and their counsel, Bernson, Hoeniger, Freitag & Abbey, from an order of the United States District Court for the Southern District of New York, dated August 23, 1973, (a) dismissing without prejudice plaintiffs' action against defendants, (b) enjoining and disqualifying plaintiffs' counsel, Bernson, Hoeniger, Freitag & Abbey, and Stuart Charles Goldberg from acting as attorneys for plaintiffs in this action or in any future action against defendant Empire Fire and Marine Insurance Company (Empire) involving the same transactions, occurrences, events, allegations,

facts or issues, and (c) enjoining Bernson, Hoeniger, Freitag & Abbey and Stuart Charles Goldberg from disclosing confidential information regarding Empire to others. Intervenor Stuart Charles Goldberg also appeals from said order.

Defendants Empire, Gross, Kaplan, Phillips, Kratky, Lalich, Swick, Jennings, Jr., Sitomer, Sitomer & Porges, A. L. Sitomer, S. J. Sitomer and Robert E. Porges cross-appeal from the order insofar as that order failed to disqualify plaintiffs, Meyerhofer and Federman, from acting as class representatives of those who purchased the common stock of Empire, or to enjoin them from disclosing confidential information learned either from Bernson, Hoeniger, Freitag & Abbey or from Stuart Charles Goldberg.

The full import of the problems and issues presented on this appeal cannot be appreciated and analyzed without an initial statement of the facts out of which they arise.

Empire Fire and Marine Insurance Company on May 31, 1972, made a public offering of 500,000 shares of its stock, pursuant to a registration statement filed with the Securities and Exchange Commission (SEC) on March 28, 1972. The stock was offered at $16 a share. Empire's attorney on the issue was the firm of Sitomer, Sitomer & Porges. Stuart Charles Goldberg was an attorney in the firm and had done some work on the issue.

Plaintiff Meyerhofer, on or about January 11, 1973, purchased 100 shares of Empire stock at $17 a share. He alleges that as of June 5, 1973, the market price of his stock was only $7 a share—hence, he has sustained an unrealized loss of $1,000. Am'd Compl. ¶ 9a. Plaintiff Federman, on or about May 31, 1972, purchased 200 shares at $16 a share, 100 of which he sold for $1,363, sustaining a loss of some $237 on the stock sold and an unrealized loss of $900 on the stock retained.

On May 2, 1973, plaintiffs, represented by the firm of Bernson, Hoeniger, Freitag & Abbey (the Bernson firm), on behalf of themselves and all other purchasers of Empire common stock, brought this action alleging that the registration statement and the prospectus under which the Empire stock had been issued were materially false and misleading. Thereafter, an amended complaint, dated June 5, 1973, was served. The legal theories in both were identical, namely, violations of various sections of the Securities Act of 1933, the Securities Exchange Act of 1934, Rule 10b-5, and common law negligence, fraud and deceit. Damages for all members of the class or rescission were alternatively sought.

The lawsuit was apparently inspired by a Form 10-K which Empire filed with the SEC on or about April 12, 1973. This Form revealed that "The Registration Statement under the Securities Act of 1933 with respect to the public offering of the 500,000 shares of Common Stock did not disclose the proposed $200,000 payment to the law firm as well as certain other features of the compensation arrangements between the Company [Empire] and such law firm [defendant Sitomer, Sitomer and Porges]." Later that month Empire disseminated to its shareholders a proxy statement and annual report making similar disclosures.

The defendants named were Empire, officers and directors of Empire, the Sitomer firm and its three partners, A. L. Sitomer, S. J. Sitomer and R. E. Porges, Faulkner, Dawkins & Sullivan Securities Corp., the managing underwriter, Stuart Charles Goldberg, originally alleged to have been a partner of the Sitomer firm, and certain selling stockholders of Empire shares.

On May 2, 1973, the complaint was served on the Sitomer defendants and Faulkner. No service was made on Goldberg who was then no longer associated with the Sitomer firm. However, he was advised by telephone that he had

been made a defendant. Goldberg inquired of the Bernson firm as to the nature of the charges against him and was informed generally as to the substance of the complaint and in particular the lack of disclosure of the finder's fee arrangement. Thus informed, Goldberg requested an opportunity to prove his non-involvement in any such arrangement and his lack of knowledge thereof. At this stage there was unfolded the series of events which ultimately resulted in the motion and order thereon now before us on appeal.

Goldberg, after his graduation from Law School in 1966, had rather specialized experience in the securities field and had published various books and treatises on related subjects. He became associated with the Sitomer firm in November 1971. While there Goldberg worked on phases of various registration statements including Empire, although another associate was responsible for the Empire registration statement and prospectus. However, Goldberg expressed concern over what he regarded as excessive fees, the nondisclosure or inadequate disclosure thereof, and the extent to which they might include a "finder's fee," both as to Empire and other issues.

The Empire registration became effective on May 31, 1972. The excessive fee question had not been put to rest in Goldberg's mind because in middle January 1973 it arose in connection with another registration (referred to as "Glacier"). Goldberg had worked on Glacier. Little purpose will be served by detailing the events during the critical period January 18 to 22, 1973, in which Goldberg and the Sitomer partners were debating the fee disclosure problem. In summary Goldberg insisted on a full and complete disclosure of fees in the Empire and Glacier offerings. The Sitomer partners apparently disagreed and Goldberg resigned from the firm on January 22, 1973.

On January 22, 1973, Goldberg appeared before the SEC and placed before it information subsequently embodied in his affidavit dated January 26, 1973, which becomes crucial to the issues now to be considered.

Some three months later, upon being informed that he was to be included as a defendant in the impending action, Goldberg asked the Bernson firm for an opportunity to demonstrate that he had been unaware of the finder's fee arrangement which, he said, Empire and the Sitomer firm had concealed from him all along. Goldberg met with members of the Bernson firm on at least two occasions. After consulting his own attorney, as well as William P. Sullivan, Special Counsel with the Securities and Exchange Commission, Division of Enforcement, Goldberg gave plaintiffs' counsel a copy of the January 26th affidavit which he had authored more than three months earlier. He hoped that it would verify his nonparticipation in the finder's fee omission and convince the Bernson firm that he should not be a defendant. The Bernson firm was satisfied with Goldberg's explanations and, upon their motion, granted by the court, he was dropped as a defendant. After receiving Goldberg's affidavit, the Bernson firm amended plaintiffs' complaint. The amendments added more specific facts but did not change the theory or substance of the original complaint.

By motion dated June 7, 1973, the remaining defendants moved "pursuant to Canons 4 and 9 of the Code of Professional Responsibility, the Disciplinary Rules and Ethical Considerations applicable thereto, and the supervisory power of this Court" for the order of disqualification now on appeal.

By memorandum decision and order, the District Court ordered that the Bernson firm and Goldberg be barred from acting as counsel or participating with counsel for plaintiffs in this or any future action against Empire involving the transactions placed in issue in this lawsuit and from disclosing confidential information to others.

The complaint was dismissed without prejudice. The basis for the Court's decision is the premise that Goldberg had obtained confidential information from his client Empire which, in breach of relevant ethical canons, he revealed to plaintiffs' attorneys in their suit against Empire. The Court said its decision was compelled by "the broader obligations of Canons 4 and 9." [1]

[1] There is no proof—not even a suggestion—that Goldberg had revealed any information, confidential or otherwise, that might have caused the instigation of the suit. To the contrary, it was not until after the suit was commenced that Goldberg learned that he was in jeopardy. The District Court recognized that the complaint had been based on Empire's—not Goldberg's—disclosures, but concluded because of this that Goldberg was under no further obligation "to reveal the information or to discuss the matter with plaintiffs' counsel."

[2] Despite the breadth of paragraphs EC 4-4 and DR 4-101(B), DR 4-101(C) recognizes that a lawyer may reveal confidences or secrets necessary to defend himself against "an accusation of

1. Code of Professional Responsibility

Canon 4

A lawyer Should Preserve the Confidence and Secrets of a Client

Ethical Considerations

EC 4-1 Both the fiduciary relationship existing between lawyer and client and the proper functioning of the legal system require the preservation by the lawyer of confidences and secrets of one who has employed or sought to employ him.

* * * * *

EC 4-4 The attorney-client privilege is more limited than the ethical obligation of a lawyer to guard the confidences and secrets of his client. The ethical precept, unlike the evidentiary privilege, exists without regard to the nature or source of information or the fact that others share the knowledge. A lawyer should endeavor to act in a manner which preserves the evidentiary privilege . . . .

EC 4-5 A lawyer should not use information acquired in the course of the representation of a client to the disadvantage of the client and a lawyer should not use, except with the consent of his client after full disclosure, such information for his own purposes . . . .

EC 4-6 The [illegible]tion of a lawyer to preserve the con[illegible]ces and secrets of his client continues after the termination of his employment . . . .

Disciplinary Rules

DR 4-101 Preservation of Confidences and Secrets of a Client.

(A) "Confidence" refers to information protected by the attorney-client privilege under applicable law, and "secret" refers to other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client.

(B) Except when permitted under DR 4-101(C), a lawyer shall not knowingly:

(1) Reveal a confidence or secret of his client.

(2) Use a confidence or secret of his client to the disadvantage of the client.

(3) Use a confidence or secret of his client for the advantage of himself or of a third person, unless the client consents after full disclosure.

(C) A lawyer may reveal:

(4) Confidences or secrets necessary to establish or collect his fee or to defend himself or his employees or associates against an accusation of wrongful conduct.

Canon 9

A Lawyer Should Avoid Even the Appearance of Professional Impropriety Ethical Considerations

EC 9-1 Continuation of the American concept that we are to be governed by rules of law requires that the people have faith that justice can be obtained through our legal system. A lawyer should promote public confidence in our system and in the legal profession.

EC 9-6 Every lawyer owes a solemn duty to uphold the integrity and honor of his profession: to encourage respect for the law and for the courts and the judges thereof; to observe the Code of Professional Responsibility; to act as a member of a learned profession, one dedicated to public service; to cooperate with his brother lawyers in supporting the organized bar through the devoting of his time, efforts, and financial support as his professional standing and ability reasonably permit; to conduct himself so as to reflect credit on the legal profession and to inspire the confidence, respect, and trust of his clients and of the public; and to strive to avoid not only professional impropriety but also the appearance of impropriety.

wrongful conduct." This is exactly what Goldberg had to face when, in their original complaint, plaintiffs named him as a defendant who wilfully violated the securities laws.

The charge, of knowing participation in the filing of a false and misleading registration statement, was a serious one. The complaint alleged violation of criminal statutes and civil liability computable at over four million dollars. The cost in money of simply defending such an action might be very substantial. The damage to his professional reputation which might be occasioned by the mere pendency of such a charge was an even greater cause for concern.

[3] Under these circumstances Goldberg had the right to make an appropriate disclosure with respect to his role in the public offering. Concomitantly, he had the right to support his version of the facts with suitable evidence.

The problem arises from the fact that the method Goldberg used to accomplish this was to deliver to Mr. Abbey, a member of the Bernson firm, the thirty page affidavit, accompanied by sixteen exhibits, which he had submitted to the SEC. This document not only went into extensive detail concerning Goldberg's efforts to cause the Sitomer firm to rectify the nondisclosure with respect to Empire but even more extensive detail concerning how these efforts had been precipitated by counsel for the underwriters having come upon evidence showing that a similar nondisclosure was contemplated with respect to Glacier and their insistence that full corrective measures should be taken. Although Goldberg's description reflected seriously on his employer, the Sitomer firm and, also, in at least some degree, on Glacier, he was clearly in a situation of some urgency. Moreover, before he turned over the affidavit, he consulted both his own attorney and a distinguished practitioner of securities law, and he and Abbey made a joint telephone call to Mr. Sullivan of the SEC. Moreover, it is not clear that, in the context of this case, Canon 4 applies to anything except information gained from Empire. Finally, because of Goldberg's apparent intimacy with the offering, the most effective way for him to substantiate his story was for him to disclose the SEC affidavit. It was the fact that he had written such an affidavit at an earlier date which demonstrated that his story was not simply fabricated in response to plaintiffs' complaint.

[4] The District Court held: "All that need be shown . . . is that during the attorney-client relationship Goldberg had access to his client's information relevant to the issues here." *See* Emle Industries, Inc. v. Patentex, Inc., 478 F.2d 562 (2d Cir. 1973). However, the irrebutable presumption of *Emle Industries* has no application to the instant circumstances because Goldberg never sought to "prosecute litigation," either as a party, *compare* Richardson v. Hamilton International Corp., 62 F.R.D. 413 (E.D.Pa.1974), or as counsel for a plaintiff party. *Compare* T. C. Theatre Corporation v. Warner Brothers Pictures, 113 F.Supp. 265 (S.D.N.Y.1953). At most the record discloses that Goldberg might be called as a witness for the plaintiffs but that role does not invest him with the intimacy with the prosecution of the litigation which must exist for the *Emle* presumption to attach.

[5] In addition to finding that Goldberg had violated Canon 4, the District Court found that the relationship between Goldberg and the Bernson firm violated Canon 9 of the Code of Professional Responsibility which provides that:

> EC 9-6 Every lawyer [must] strive to avoid not only professional impropriety but also the appearance of impropriety.

The District Court reasoned that even though there was no evidence of bad faith on the part of either Goldberg or the Bernson firm, a shallow reading of the facts might lead a casual observer to conclude that there was an aura of complicity about their relationship. How-

ever, this provision should not be read so broadly as to eviscerate the right of self-defense conferred by DR4-101(C)(4).

[6-8] Nevertheless, Emle Industries, Inc. v. Patentex, Inc., *supra*, requires that a strict prophylactic rule be applied in these cases to ensure that a lawyer avoids representation of a party in a suit against a former client where there may be the appearance of a possible violation of confidence. To the extent that the District Court's order prohibits Goldberg from *representing* the interests of these or any other plaintiffs in this or similar actions, we affirm that order. We also affirm so much of the District Court's order as enjoins Goldberg from disclosing material information except on discovery or at trial.

[9] The burden of the District Court's order did not fall most harshly on Goldberg; rather its greatest impact has been felt by Bernson, Hoeniger, Freitag & Abbey, plaintiffs' counsel, which was disqualified from participation in the case. The District Court based its holding, not on the fact that the Bernson firm showed bad faith when it received Goldberg's affidavit, but rather on the fact that it was involved in a tainted association with Goldberg because his disclosures to them inadvertently violated Canons 4 and 9 of the Code of Professional Responsibility. Because there are no violations of either of these Canons in this case, we can find no basis to hold that the relationship between Goldberg and the Bernson firm was tainted. The District Court was apparently unpersuaded by appellees' salvo of innuendo to the effect that Goldberg "struck a deal" with the Bernson firm or tried to do more than prove his innocence to them. Since its relationship with Goldberg was not tainted by violations of the Code of Professional Responsibility, there appears to be no warrant for its disqualification from participation in either this or similar actions. *A fortiori* there was no sound basis for disqualifying plaintiffs or dismissing the complaint.

Order dismissing action without prejudice and enjoining Bernson, Hoeniger, Freitag & Abbey from acting as counsel for plaintiffs herein reversed. Upon cross-appeal by Empire, Gross, Kaplan, Phillips, Kratky, Lalich, Swick and Jennings, Jr., and cross-appeal by Sitomer, Sitomer and Porges, A. L. Sitomer, S. J. Sitomer and R. E. Porges insofar as said orders failed to enjoin plaintiffs from disclosing confidential information regarding Empire and to disqualify plaintiffs from representing themselves or a similar class of Empire stockholders, appeals dismissed. To the extent that the orders appealed from prohibit Goldberg from acting as a party or as an attorney for a party in any action arising out of the facts herein alleged, or from disclosing material information except on discovery or at trial, they are affirmed.

WEST KEY NUMBER SYSTEM

Memorandum, MacMahon, D. J., January 19, 1976.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

#43750

----------x

HERBERT FEDERMAN and DIETRICH MEYERHOFER,

Plaintiffs,

-against-

EMPIRE FIRE AND MARINE INSURANCE COMPANY et al.,

Defendants,

-and-

STUART C. GOLDBERG and JACOB ASCHKENASY,

Additional Defendants on Cross-Claims.

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73 Civ. 1940-LFM

MEMORANDUM

U.S. DISTRICT COURT
FILED
JAN 19 1976
S. D. OF N. Y.

MacMAHON, District Judge.

This is an application under Rule 23(e), Fed.R. Civ.P., for approval of a settlement and determination of reasonable attorney's fees in this consolidated class action.

The action arises out of an allegedly false and misleading registration statement and accompanying prospectus, issued in connection with the May 31, 1972 public

offering of 500,000 shares of Empire Fire and Marine Insurance Company ("Empire") stock, at an offering price of $16 per share. Plaintiffs assert that the registration statement and prospectus wrongfully failed to disclose that defendant law firm, Sitomer, Sitomer & Porges (the "Sitomer firm"), Empire's counsel on the issue, was to receive a $200,000 finder's fee from the proceeds of the offering. Plaintiffs also charge nondisclosure of other aspects of the compensation agreement between Empire and the Sitomer firm. According to plaintiffs, the registration statement was misleading because the alleged understatement of the offering expenses inflated the amount shown as received from the offering.

The market price of Empire common stock showed a small premium following the offering, but then gradually declined to about $7 per share in early May 1973. This decline, however, paralleled a decline in the market price of the common stock of other publicly-owned casualty insurers during this period.

The complaint in the original action (the "Meyerhofer action") was filed on May 2, 1973.[1] Plaintiffs are two individuals who purchased Empire common

stock between May 31, 1972 and April 30, 1973. Defendants are Empire and its directors, the Sitomer firm, and a number of "selling shareholders." Plaintiffs were represented by the firm of Bernson, Hoeniger, Freitag & Abbey (the "Bernson firm").

On August 23, 1973, we dismissed the complaint without prejudice on the ground that the Bernson firm had violated Canons 4 and 9 of the Code of Professional Responsibility in that it had held a number of discussions with additional defendant Goldberg, a former member of the Sitomer firm. Plaintiffs and the Bernson firm appealed from our order, and defendants cross-appealed claiming that the individual plaintiffs should have been disqualified from acting as class representatives.

During the pendency of this appeal, plaintiffs, represented by the firm of Shatzkin, Cooper, Labaton, Rudoff & Bandler (the "Shatzkin firm"), commenced a new action (the "Federman action")[2] by filing a complaint on October 23, 1973. On June 10, 1974, the Court of Appeals reversed our finding of violations of Canons 4 and 9 and reinstated the complaint in the Meyerhofer

action.[3] Defendants moved for rehearing en banc, which was denied, and thereafter filed a petition for a writ of certiorari to the Supreme Court. Certiorari was denied on November 11, 1974,[4] and the Second Circuit's mandate finally issued on December 10, 1974. Thereafter, the two actions were consolidated for all purposes.

The complaint seeks to recover on the basis that defendants had violated Sections 11 and 12 of the Securities Act of 1933 ("Securities Act"), 15 U.S.C. §§ 77k and 77ℓ, and Section 10(b) of the Securities Exchange Act of 1934 ("Exchange Act"), 15 U.S.C. § 78j(b). We granted defendants' motion to dismiss the claim based upon § 12 of the Securities Act on the ground that defendants were not the "immediate sellers" of the stock. We also granted plaintiffs' motion for class action determination. The class, as finally defined, consists of all persons who acquired Empire common stock from May 31, 1972 to April 30, 1973, inclusive.

Settlement negotiations were conducted concurrently with intensive preparation for trial. These negotiations were not conducted in the dark, as the parties had engaged in a substantial amount of discovery

through interrogatories, notices to produce, and depositions. In addition, plaintiffs received and reviewed transcripts of the testimony of ten witnesses before the SEC.

As a result of the extensive discovery and negotiations, the proposed settlement was reached on August 22, 1975. It provides that all claims between and among plaintiffs, defendants, and additional defendant Aschkenasy shall be dismissed on the merits with prejudice.[5] Defendant Empire will deliver $160,000 and defendant Sitomer firm will deliver $625,000 to a class settlement fund.[6]

This fund, less such amounts as may be authorized by the court as allowances for attorney's fees and disbursements, is to be apportioned ratably among the members of the class in proportion to their recognized loss. The stipulation of settlement provides that the recognized loss is to be measured as the difference between (a) the lower of (i) cost per share (excluding brokerage commission) paid by the purchaser, or (ii) $16 per share, and (b) the higher of (i) the actual sales price per share (excluding brokerage commission) if sold,

or (ii) $7 per share if sold at less than $7 per share or if still held at the time a proof of claim is filed.[7]

Pursuant to an order of this court, dated August 25, 1975, plaintiffs gave notice of the proposed settlement to all known members of the class. On October 21, 1975, a hearing was held respecting the fairness of the proposed settlement.

The proponents of the settlement have the burden of proving (1) that the settlement is not collusive but was reached after arm's length bargaining; (2) that counsel for proponents are experienced in similar cases; (3) that there has been sufficient discovery to enable counsel to act intelligently; and (4) that the number of objectants or their relative interest is small.[8]

Proponents of this settlement have clearly established the absence of collusion and the existence of experienced counsel. All counsel are able and respected members of the bar of this court, and their professional skill and integrity are unquestioned. There is not the slightest hint that they would shy away from a trial if one were in the best interests of their clients.

Proponents have also demonstrated that they have conducted extensive discovery in this case. And, finally, there are no objectants to the proposed settlement.[9] The absence of objectants, in itself, is strong evidence that the settlement is fair.[10]

The factors necessary to raise a presumption in favor of the settlement have, thus, been established. This strong initial presumption of fairness still must withstand the universally recognized test of plaintiffs' likelihood of success.

The function of the court is to reach a determination of the probabilities of ultimate success should the case be tried. This requires an educated estimate of the strength and weakness of plaintiffs' case in light of the novelty and complexity of the legal questions, the issues of fact, the expense involved, and the likely duration of the suit.[11]

If there are issues of fact and questions of law which make any recovery problematical, the determination of what amount of money constitutes a fair settlement is not a matter of mathematical science. The court

is in no position to substitute its judgment for that of honest and competent attorneys, who, after exhaustive discovery, have made a determination that the settlement represents a fair and realistic appraisal of their clients' chances of ultimate success.

In this case, there are issues of fact and law which, in a trial on the merits, might result in a recovery substantially less than the settlement fund. In particular, plaintiffs would have to prove that the alleged nondisclosure of the compensation arrangement between Empire and the Sitomer firm made the registration statement misleading as to a material fact. Also, establishing a causal connection between the alleged misstatement and the loss suffered by the Empire stockholders would be quite troublesome. Under § 11(e) of the Securities Act, a defendant may mitigate damages by showing that the decline in price was caused by factors other than the allegedly misleading statement, and under § 10(b) of the Exchange Act, the usual measure of recovery is "out of pocket" loss, that is, the difference between the amount paid for the stock and its actual worth. We have already noted that the decline in market price of

Empire common stock paralleled that of other casualty insurers. Thus, even if plaintiffs succeeded in proving materiality, they might still be faced with a hollow victory if a jury found no causal connection.[12]

In view of these issues and questions, we cannot say that plaintiffs' counsel were wrong in their appraisal of the ultimate outcome. Finally, as we have previously noted, there are no objectants to the proposed settlement. We find, therefore, that the notice was proper and that the proposed settlement is fair and equitable.

The final matter before us is the application for attorney's fees, together with disbursements. Plaintiffs' counsel have requested $225,000 as a fee for all legal services rendered to plaintiffs and the class and $41,701.65 in disbursements.[13]

Unquestionably, plaintiffs' attorneys have struggled long and hard against the determined opposition of defendants' counsel. We have briefly mentioned defendants' various attempts to obtain a dismissal of this action. Counsel for plaintiffs have expended considerable time and effort in service to their clients

and the class which they represent. Moreover, they have offered their services to administer the distribution of the settlement fund without further charge.[14]

In fixing the amount of attorney's fees, there is no precise mathematical formula that the court must follow. We have been warned, however, "[f]or the sake of their own integrity, the integrity of the legal profession, and the integrity of Rule 23, it is important that the courts should avoid awarding 'windfall fees' and that they should likewise avoid every appearance of having done so."[15] The only purpose of an award is to justly compensate the attorney for the reasonable value of services benefiting the class.[16] Therefore, we must carefully scrutinize the fee application before us.

With this in mind, the starting point of our inquiry is the calculation of the amount of time expended by counsel in service to the class. Plaintiffs' attorneys have submitted rather detailed affidavits of the time spent by each attorney and the nature of the services performed. Of the members of the Bailey firm, Mr. Hoeniger (partner) claims to have spent a total of 583 hours, Mr. Abbey (partner) claims to have spent

308.5 hours, and Mr. Freitag (partner) claims to have spent 30 hours. Of the members of the Shatzkin firm, Mr. Labaton (partner) claims to have spent 317 hours, Mr. Bandler (partner) claims to have spent 19 hours, and Mr. Feffer (associate) claims to have spent 126.25 hours. Thus, the total time claimed to have been expended is 1,403.75 hours.

We note that Mr. Hoeniger and Mr. Abbey claim a total of 81 hours of "unrecorded time." This figure represents 10% of their recorded time. In light of the considerable detail of the affidavits, which reflect careful record-keeping, it is improbable that these gentlemen would have failed to record a total of 10% of their time. We find that no more than 5% of the total of their recorded time should be attributed to unrecorded activities. Therefore, we reduce the figure for unrecorded time to 41 hours.

The affidavits of Mr. Hoeniger and Mr. Abbey also reflect that in excess of 72.5 hours was spent by them in aid of the appeal in the Meyerhofer action. As the Court of Appeals noted in its decision, the burden of our dismissal of the complaint fell most

heavily upon the Bernson firm.[17] This being the case, it might be questioned whether any part of this time may properly be charged against the settlement fund.

However, we also realize that defendants cross-appealed to disqualify the individual plaintiffs from acting as class representatives. If the cross-appeal had been successful, it would have resulted in the dismissal of the complaint in the Federman action as well. The ultimate outcome could very well have been no recovery at all, since the individual plaintiffs were the only members of the class to seek redress in the courts. We also realize that the members of the Bernson firm have greatly contributed to the overall settlement of the class claims.

In light of these facts, we feel that we should attempt to apportion the time spent on the appeal between time benefiting the class and time benefiting the Bernson firm. We find, after due consideration, that a total of 50 hours out of the approximately 72.5 hours claimed may be attributed to actual service to the class.

Mr. Labaton's affidavit outlines the time spent and the nature of the services performed by the members of the Shatzkin firm. We note that, due to careful record-keeping, no time is attributed to unrecorded activities. Also, Mr. Labaton asserts that the time claimed is exclusive of approximately 50 hours of paralegal's time. However, the time claimed does include time spent in attending a number of depositions at which other of plaintiffs' counsel also appeared.

For example, Mr. Labaton claims 6 hours on May 19, 1974 and 8 hours on May 29, 1974 for attending the depsotions of Goldberg and Aschkenasy; Mr. Hoeniger also attended these depositions and claims them as time expended. In addition, Mr. Feffer attended depositions on October 17 and 18, 1974 and claims 9.75 hours spent; Mr. Labaton also attended these depositions and claims the time as well.

We feel that these examples of duplication of effort should not be charged to the settlement fund. Therefore, we reduce Mr. Labaton's claimed time by 14 hours and Mr. Feffer's by 9.75 hours.

From all of the above, we find that the time expended by each of plaintiffs' counsel is as follows:

	Hours
Mr. Hoeniger	542
Mr. Abbey	287
Mr. Freitag	30
Mr. Labaton	303
Mr. Bandler	39
Mr. Feffer	116.5
TOTAL HOURS	1,317.5

The next step is to place a value on the time spent. This is done by multiplying the number of hours by the hourly amount that attorneys of like skill would be entitled to charge for such services.[18]

Plaintiffs' counsel assert that their normal hourly rate in non-contingent matters is $125 for Messrs. Hoeniger and Abbey, $85 for Mr. Freitag, $90 for Messrs. Labaton and Bandler, and $50 for Mr. Feffer. After studying the affidavits with regard to the qualifications of these gentlemen, we find that these amounts are not out of line with the hourly rates of other attorneys in this

area for similar work and, therefore, adopt those values. Using these figures, the aggregate total value of time expended in service to the class is $142,870.[19]

After arriving at a figure representing the normal charge for the number of hours expended, we must consider other less objective factors.[20] These include, among other things, the "risk of litigation," the result achieved, the novelty and difficulty of the issues involved, and whether plaintiffs had the benefit of a prior government action.[21]

Being mindful of all these factors, we find that plaintiffs' attorneys are entitled to a premium of 25% over their normal fee, or $35,717.50. This brings the total of the award for all legal services rendered to $178,587.50.

The requested disbursements in this case are relatively large -- $41,701.65. Aside from the normal expenditures in this type of suit, the largest single item claimed as a disbursement is a $23,300 legal fee charged by the law firm of Simpson Thacher & Bartlett for prosecuting the appeal from our dismissal of the

complaint in the Meyerhofer action and in opposing both the motion for en banc hearing of the Court of Appeals' decision and the petition for certiorari to the Supreme Court. This is accompanied by a request for reimbursement of $5,500 expended as printing costs on that appeal.

We have already discussed the statement of the Court of Appeals that the burden of our dismissal fell most heavily upon the Bernson firm, and we have mentioned the cross-appeal and the contribution of the members of the Bernson firm to the settlement. In light of these factors, we feel it necessary to attempt an apportionment of these costs between those necessary for the protection of the class and those of benefit to the Bernson firm. Again, this cannot be done with mathematical certainty but must be the result of our evaluation based upon our familiarity with the facts in this proceeding.

We find, after careful consideration of all the factors we have mentioned, that two-thirds of these costs should be borne by the settlement fund. Therefore, of the total of $28,800 expended on the appeal for legal services and printing costs, $19,200 is an allowable disbursement.

In all other respects, the requested disbursements appear to have been reasonably incurred in the prosecution of this suit. Therefore, the total award allowed as disbursements is $32,101.65.

Accordingly:

The application for approval of the proposed settlement is granted. Plaintiffs' counsel shall immediately commence the administration and distribution of the class settlement fund in accordance with the terms of the stipulation of settlement.

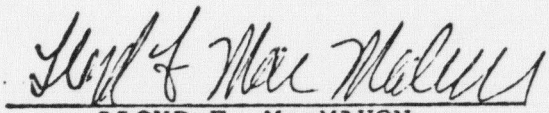
Within ninety (90) days from the date of this memorandum, plaintiffs' counsel shall submit an affidavit showing compliance with the provisions of the stipulation of settlement and settle a final judgment terminating this action insofar as it concerns claims asserted between and among plaintiffs, defendants, and additional defendant Aschkenasy.

The application for attorney's fees and disbursements is also granted. Plaintiffs' attorneys are awarded the sum of $178,587.50 as a legal fee and $32,101.65 as disbursements.

Settle an order within fifteen (15) days.

Dated: New York, N. Y.

January 16, 1976



LLOYD F. MacMAHON
United States District Judge

Federman et ano. v. Empire Fire and Marine Ins. Co. et al. 73 Civ. 1940-LFM

FOOTNOTES

1. Meyerhofer v. Empire Fire and Marine Insurance Co., 73 Civ. 1940-LFM.

2. Federman v. Empire Fire and Marine Insurance Co., 73 Civ. 4516-LFM.

3. Meyerhofer v. Empire Fire & Marine Ins. Co., 497 F.2d 1190 (2d Cir. 1975).

4. 419 U.S. 998 (1975).

5. Cross-claims between defendants and additional defendant Goldberg are not covered in the settlement agreement. Plaintiffs and the class have not asserted any claims against Goldberg; therefore, the nonsettlement of these cross-claims has no effect on our determination of this application.

6. Plaintiffs' counsel have indicated that defendants have already paid over this amount to the fund. This money is presently bearing interest for the benefit of the class.

7. The $16 figure represents the public offering price. The $7 figure represents the market price of Empire common stock at the time when the compensation arrangement was disclosed to the public by means of Empire's 1972 annual report and proxy statement, disseminated in late April 1973. If any investor held stock beyond that point and consequently suffered a greater loss, a loss below the $7 figure cannot be attributed to the alleged nondisclosure.

8. See Feder v. Harrington, 58 F.R.D. 171, 174-75 (S.D.N.Y. 1972) and the cases there cited.

9. At the settlement hearing, two exhibits were received. One, from the president of the "New Jersey Research Bureau," claimed that the requested fee was excessive. The other stated that the writer was not a member of the class and should not have received notice. Neither made any objections to the settlement itself.

10. City of Detroit v. Grinnell Corp., 495 F.2d 448, 462 (2d Cir. 1974); Sunrise Toyota, Ltd. v. Toyota Motor Co., 17 Fed.R.Serv.2d 132, 136 (S.D.N.Y. 1973); Fox v. Glickman Corp., 253 F. Supp. 1005, 1013 (S.D. N.Y. 1966).

11. Protective Comm. for Independent Stockholders of TMT Trailer Ferry, Inc. v. Anderson, 390 U.S. 414, 424-25 (1968).

12. It is, of course, not the court's function on this application to decide these issues. See Newman v. Stein, 464 F.2d 689 (2d Cir. 1972).

13. Plaintiffs' counsel at this time are the Shatzkin firm and the firm of Bailey Marshall Hoeniger & Freitag (which succeeded the Bernson firm).

14. There will be disbursements incurred in administering the settlement fund for which plaintiffs' counsel may apply for reimbursement.

15. City of Detroit v. Grinnell Corp., supra, 495 F.2d at 469.

16. Lindy Bros. Bldrs., Inc. of Phila. v. American R. & S. San. Corp., 487 F.2d 161 (3d Cir. 1973).

17. Meyerhofer v. Empire Fire & Marine Ins. Co., supra, 497 F.2d at 1196.

18. City of Detroit v. Grinnell Corp., supra, 495 F.2d at 471.

19. We are, of course, aware that the number of hours expended is not the only criterion to be considered. If it were, there would always be the danger that some attorneys might "run the meter" to inflate their hours without actually performing additional services to their clients. It is for this reason that we must carefully scrutinize all fee applications in class action suits.

20. City of Detroit v. Grinnell Corp., supra, 495 F.2d at 471.

21. See City of Detroit v. Grinnell Corp., supra, 495 F.2d at 470; Alpine Pharmacy, Inc. v. Chas. Pfizer & Co., 481 F.2d 1045, 1050 (2d Cir. 1973).

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

HERBERT FEDERMAN and DIETRICH MEYERHOFER,	
Plaintiffs,	73 Civil 1940
-against-	L.F.M., U.S.D.J.
EMPIRE FIRE AND MARINE INSURANCE COMPANY, et al.,	NOTICE OF MOTION
Defendants,	
-and-	
STUART CHARLES GOLDBERG and JACOB ASCHKENASY,	
Additional Defendants and Cross-Claimants on Third Party Complaint.	

SIRS:

PLEASE TAKE NOTICE, that upon the annexed affidavit of Stuart Charles Goldberg, the annexed memorandum of law in support of the motion and upon all the papers and proceedings heretofore had herein, the undersigned will move this Court before the Hon. Lloyd F. MacMahon, United States District Judge, at the United States Courthouse, Foley Square, New York, New York, on March 19, 1976, at 2:15 O'clock in the afternoon of that day, or as soon thereafter as counsel can be heard, for an order of recusal and transfer to another Judge of this Honorable Court, and

for such other and further relief as to this Court may seem just and proper.

Dated: New York, New York
March 1, 1976

Yours, etc.

THAL & YOUTT
Attorneys for defendant Stuart Charles Goldberg in his capacity as cross-claimant
919 Third Avenue
New York, New York 10022
212, 751-3300

TO: ANTHONY L. TERSIGNI, ESQ.
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D'Amato, Costello & Shea
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JOSEPH BERGANDANO, ESQ.
Hart & Hume
Attorneys for cross-claimant and third party defendant Charles Stuart Goldberg as to claims against him
10 East 40th Street
New York, New York 10016

Affidavit of Stuart Charles Goldberg in Support of Motion.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

HERBERT FEDERMAN and DIETRICH MEYERHOFER, Plaintiffs,	:	
-against-	:	73 Civ. 1940
EMPIRE FIRE AND MARINE INSURANCE COMPANY et al., Defendants,	:	L.F.M., U.S.D.J.
-and-	:	AFFIDAVIT IN SUPPORT OF MOTION TO RECUSE AND TRANSFER
STUART CHARLES GOLDBERG and JACOB ASCHKENASY, Additional Defendants and Cross-Claimants on Third Party Complaint.	:	

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss:

STUART CHARLES GOLDBERG, being duly sworn, deposes and states:

1. I am the third party defendant and cross claimant in this action. As such I am familiar with all of the proceedings heretofore had herein.

2. Since the factual issues and grounds forming the basis for this motion relate solely to the prior court proceedings in this matter, I do not believe it necessary to set forth the history of this litigation in affidavit form. I have, however, asked counsel to include all relevant facts in the annexed memo-

randum of law and I believe it unnecessary to set them forth again in detail in this affidavit.

3. I would like to use this affidavit to set forth in a simple and concise way why I, as the party involved, feel this motion must be made and should be granted.

4. As the Court knows, from the prior proceedings herein, I was employed by the law firm of Sitomer, Sitomer & Porges. In the course of that employment I learned of certain material misrepresentations which that firm had made in the Empire registration statement that had already gone effective as well as certain material misrepresentations that the firm had included in a Registration Statement regarding another client which was to become effective with the Securities and Exchange Commission that week.

5. Prior to my joining the aforesaid law firm, I had held various positions including Assistant United States Attorney, staff member of the enforcement section of the Division of Trading and Markets in the New York Regional Office of the Securities Exchange Commission and Assistant Director and Principal Liquidator for the New York Stock Exchange. I am presently employed as an Assistant Professor at the New York Law School.

In addition to the foregoing positions, I have written numerous books and articles on securities law and attorney's responsibility.

Affidavit of Stuart Charles Goldberg.

6. Faced with this horrendous dilemma I chose to do what I believed the criminal statutes of the United States and the Code of Professional Responsibility for attorneys required - which was to report these frauds to the proper governmental authorities. At all times my prime concern was to act in a lawful and ethical manner.

7. The investigations and litigation which quite naturally and foreseeably followed my disclosures cast me in a terrible position which I was only able to endure because of my conscience and belief in the rightness of my position. In this time of recurring public scandals, I reassured myself and my employer, New York Law School, that I had acted in such a way that no discredit could be brought on me by governmental authorities, the legal profession and the institutions of our government.

8. I am hopeful that this Court can, thus, fully appreciate why the ruling of August 23, 1973, in which the Court held that I had violated Canons 4 and 9 of the Code of Professional Responsibility caused such grave emotional and professional consequences for me. Examples of the publicity resulting from the Court's ruling are attached hereto as Exhibits 1 and 2 and 3.

9. Since the ultimate issues and damage claims at trial will involve primarily the negative consequences caused to me and to my professional career by the actions of the other

parties in this suit, some of which flow from this Court's ruling, I believe that it would be difficult if not impossible to try this case before Your Honor.

10. I wish to add, however, that no claim is being raised under 28 U.S.C. 144 which involves bias or prejudice on the part of this Court.

Stuart Charles Goldberg

Sworn to before me this
1st day of March, 1976.

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EXHIBITS ANNEXED TO FOREGOING AFFIDAVIT

Exhibit 1, Article New York Law Journal.

SCG 26 DEF-EXHT 9/17/75 L. LESSER

New York Law Journal

OFFICIAL DAILY LAW NEWSPAPER DESIGNATED PURSUANT TO THE JUDICIARY LAW

NEW YORK, FRIDAY, AUGUST 31, 1973

wyer, Firm Cited in U.S. Court

'thics Violations Found In Securities Offering

By S. James Rosenfeld

New York attorney and a firm have been found by Fed- Judge Lloyd F. MacMahon of Southern District of New York ave violated Canons and 9 of Code of Professional Responsibility. Canon 4 provides that "a yer should preserve the connee and secrets of a client"; on 9 provides that a "lawyer uld avoid even the appearance professional impropriety."

The court's order, issued Aug. enjoined Charles Stuart Goldg and the firm of Bernson, Enlger, Freitag & Abbey, of 1 st 41th Street, "from acting as unsel or participating in any y with counsel for the plaintiffs this action or in any future ion against Empire (Fire and rine Insurance Company) inving the same transactions, occrences, events, allegations, facts bases, and they are further joined from disclosing confiden- l information regarding Empire others except to comply with lers of the court on discovery ceedings or upon trial." *Meyerhoff v. Empire Fire and Marine Insurance Co.*, 73 Civ. 1910-LFM.

Mr. Goldberg's attorney and the ensen firm have said they intend to appeal Judge MacMahon's lay.

The court's ruling came on motions brought: Plaintiffs had moved under Rule 56 for an order striking its suit a class action; defendants had moved for an order which would, among other things, disqualify plaintiffs' attorneys from representing plaintiffs in this action or associating with any other attorney in the prosecution of the action; and enjoin plaintiffs, their attorneys, and Mr. Goldberg from "further disclosing confidential information regarding Empire. . . ."

The underlying suit alleged that Empire's registration statement violated the federal securities laws because it omitted compensation agreements between Empire and its counsel, Sitomer, Sitomer & Porges, with whom Mr. Goldberg was then associated as a limited partner. According to the court's opinion, Mr. Goldberg "was actively involved in the preparation of the statement or in the necessary background work, such as, reviewing the minutes of Empire."

Early in January, 1973, according to the court, Mr. Goldberg became aware of "what he felt were material omissions concerning certain compensation agreements between the Sitomer firm and

(Continued on page 6, column 1)

Ruling on Ethics

(Continued)

Empire. Evidently, the possibility that these agreements would become public was the subject of much discussion within the Sitomer firm."

SEC Official Contacted

Feeling that "full disclosure to the Securities and Exchange Commission was proper and obligatory," Mr. Goldberg had his personal attorney contact Stanley Sporken, Deputy Director of the SEC's Division of Enforcement to "explain the nature of the problem and make known Goldberg's availability to meet with the SEC to discuss the problem," Judge MacMahon said.

A meeting with the SEC was set up for Jan. 22. The night before, Mr. Goldberg sent telegrams to two limited partners in the Sitomer firm telling them he was resigning and of his meeting with the SEC "for the purpose of making full and complete disclosure regarding the activities of the firm in regards to securities practice," Judge MacMahon said.

The SEC meetings resulted in an affidavit being submitted by Mr. Goldberg on Jan. 26, 1973. "No member of the firm participated in or appeared at these discussions notwithstanding their present claims that they intended to make full disclosure," the court said. The compensation agreement was first publicly disclosed in Empire's annual report, Form 10-K, filed with the SEC on April 12, 1973, and sent to Empire stockholders on or before April 30, 1973.

On May 2, plaintiffs filed their lawsuit, serving the Sitomer firm and its general partners. Plaintiffs' counsel telephoned Mr. Goldberg the following day, telling him that the action had been filed and that Mr. Goldberg named as a defendant. According to the court: Goldberg denied any wrongdoing and told counsel of his efforts to have the Sitomer firm make disclosure before the SEC. Counsel agreed that if Goldberg were not involved in the alleged omissions, they would move to drop Goldberg as a party defendant."

Subsequently, two meetings were arranged between Mr. Goldberg and plaintiffs' counsel so that Goldberg could be shown the complaint without being served, it was said. At both meetings, plaintiffs' counsel asked for a copy of Mr. Goldberg's affidavit to the SEC. Mr. Goldberg was said to have refused until William P. Sullivan, special counsel of the enforcement division, "stated that the SEC had no objection to disclosure of the affidavit."

Thereafter, plaintiffs' counsel successfully moved for an order dropping Mr. Goldberg as a named defendant.

Canon Explained

Judge MacMahon said that, in reviewing charges of unethical conduct against attorneys, "courts may not rely upon the good faith of the attorneys involved, but rather must apply 'a strict prophylactic rule to prevent any possibility, however, slight, that confidential information acquired from a client during a previous relationship may subsequently be used to the client's disadvantage.' *Emle Industries, Inc. v. Patentex, Inc.*, 478 F.2d 562 (2d Cir. 1973)."

The Canon 4 obligation of a lawyer to preserve his client's confidences, the court said, "is broader than the evidentiary attorney-client privilege and 'exists without regard to the nature or source of information or the fact that others share the knowledge.' Furthermore, the court does not stop to inquire whether any information which Goldberg or his firm may have disclosed to plaintiffs' counsel was in fact confidential, for such an inquiry would reveal the very confidences sought to be protected. All that need be shown, therefore, is that during the attorney-client relationship Goldberg had access to his client's information relevant to the issues here."

The court found that Mr. Goldberg had access to the client material at issue and that "there can be no question that he has associated with, and made disclosures to, the plaintiffs without the consent of Empire. The mere association compromises the confidences which Canon 4 seeks to protect." The court also found that Goldberg's "association with the former client's adversary gives the appearance of impropriety" however innocent it may have been.

Nor were plaintiffs' counsel able to "disentangle themselves from the tainted association," the court

EXHIBIT 1

Exhibit 1.

said. They agreed to meet with Goldberg and were willing, if not eager, listeners to disclosures of confidences which they knew, or should have known, were protected by the Canons of Professional Responsibility. They, thus, not only encouraged but also participated in a violation of Canon 4 and Canon 9."

Judge MacMahon also rejected an argument that Mr. Goldberg was required to reveal the information because, if true, it constituted a continuing criminal and civil violation of the securities laws.

Judge MacMahon also rejected an argument that Mr. Goldberg was required by Disciplinary Rule 7-102 (B) (1) to reveal the information because, if true, it constituted a continuing criminal and civil violation of the securities laws. Noting that Mr. Goldberg gave his affidavit to the SEC in January, 1973, that the information was disclosed by Empire in its annual report in April of that year, and that the complaint in the instant suit was "thus filed on the basis of information already public," the court said:

"Disciplinary Rule 7-102 (B) (1) requires the lawyer to reveal the fraud only if the client refuses to do so. Since the client had already revealed the omission to its stockholders and to the public, via the SEC, Goldberg had no further obligation (under the Rule) to reveal the information or to discuss the matter with plaintiffs' counsel."

The court specifically refrained from considering the propriety of Mr. Goldberg's disclosures to the SEC.

Exhibit 2, Lions in the Street.

Lions in the Street

The Inside Story of the Great Wall Street Law Firms

Paul Hoffman

A SIGNET BOOK
NEW AMERICAN LIBRARY
TIMES MIRROR

Ex. SCG 28 for I.D.
W.B. 9/17/75

EXHIBIT 2

Exhibit 2.

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1 2 3 4 5 6 7 8 9

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Exhibit 2.

cutting themselves in for a share of the client's business. If they can't get out when the getting is good, who wants in?

Finally, there is *Meyerhofer* v. *Empire Fire & Marine Insurance Company*, which shows that the S.E.C.'s new standards by no means have won universal acceptance. In *Meyerhofer*, an attorney acted exactly as the S.E.C. had urged, precisely the opposite of Epley—he blew the whistle, both on his law firm and on his clients. But instead of being hailed as a hero, he was held to have violated the Canons of Ethics.

Stewart Charles Goldberg was a "limited partner" of a small midtown firm, Sitomer, Sitomer & Porges, which was counsel to Empire Fire & Marine Insurance Company on an offering of 500,000 shares. In addition to its fee of $15,000, Sitomer was given the option of buying Empire stock at $2.05 a share and reselling it in the public offering at $16. This was not disclosed in the prospectus.

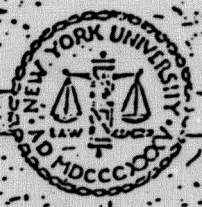
Goldberg first became aware of the arrangement while working on a similar offering involving Glacier General Assurance Company. In Empire, the firm's profits were about $200,000; with Glacier, they would have been $900,000. Apparently unable to persuade his superiors that the matter required public disclosure, Goldberg resigned from the firm, retained counsel—Burton Finkelstein of Phillips Nizer—and went to the S.E.C.

As a result, the commission blocked the Glacier offering and started an investigation of the Sitomer firm. (It has since filed suit to enjoin the lawyers.) When the Empire arrangement was made public, a stockholder's class action was filed against the company to recover the windfall profit. Portions of the record are still sealed, but apparently Judge Lloyd F. McMahon reprimanded Goldberg for violating client-counsel confidentiality by going to the S.E.C. The commission, in turn, was forced to intervene with an *amicus curiae* brief, apparently in support of the whistle-blowing lawyer.

The case poses the problem for any securities lawyer in a similar dilemma: *National Student Marketing* says he's damned if he doesn't disclose; *Meyerhofer*, that he's damned if he does. Until the issue is resolved—and resolved in the S.E.C.'s favor—it seems likely that perplexed lawyers will pursue the path of Epley, not that of Goldberg.

Exhibit 3, NYC Law Journal.

New York University Law Review



LITIGATING A SOVEREIGN IMMUNITY CLAIM—THE *HAITI* CASE

Andreas F. Lowenfeld

THE SEC'S RELUCTANT POLICE FORCE: A NEW ROLE FOR LAWYERS

Frederick D. Lipman

Illegitimacy and Equal Protection

Overbreadth Review and the Burger Court

The Liability of Outside Directors Under Rule 10b-5

Book Review: *John Phillip Reid*

VOLUME 49 OCTOBER 1974 NUMBER 4

Ex. SCG 33 for I.D.
W.S. 9/17/75

EXHIBIT 3

Exhibit 3.

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* The author is aware of at least one instance in which a partner of a law firm apparently gained immunity from an SEC enforcement action by outracing both his partners and his client to the Commission. Meyerhofer v. Empire Fire & Marine Ins. Co., 497 F.2d 1190 (2d Cir. 1974), *petition for cert. filed*, 43 U.S.L.W. 3148 (U.S. Sept. 18, 1974) (No. 74-292); SEC v. Sitomer, Sitomer & Porges, No. 73 Civ. 4508, [1973 Transfer Binder] CCH FED. SEC. L. REP. ¶ 94,184 (S.D.N.Y., filed Oct. 19, 1973). The author's firm has represented certain of the partners named in the *Sitomer* case. The ethical dilemma confronting a securities attorney in this situation has been described in Goldberg, *Ethical Dilemma: Attorney-Client Privilege vs. the National Student Marketing Doctrine*, 1 SEC. REG. L.J. 297, 306-08 (1974).

Memorandum of Law in Support of Motion to
Recuse Hon. LLoyd F. MacMahon.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

HERBERT FEDERMAN and DIETRICH MEYERHOFER,	:	73 Civ. 1940-LFM
Plaintiffs,	:	
-against-	:	
EMPIRE FIRE AND MARINE INSURANCE COMPANY et al.,	:	MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT GOLDBERG'S MOTION TO RECUSE HON. LLOYD F. MAC MAHON
Defendants,	:	
-and-	:	
STUART CHARLES GOLDBERG and JACOB ASCHKENASY,	:	
Additional Defendants and Cross-Claimants on Third Party Complaint.	:	

This Memorandum Of Law is being submitted in support of defendant Goldberg's motion to have the Hon. Lloyd F. Mac Mahon recuse himself from sitting on the above-captioned case pursuant to Canons 2 and 3 of the ABA's Code of Judicial Conduct.

STATEMENT OF FACTS

Empire Fire and Marine Insurance Company ("Empire") effectuated a public offering on May 31, 1972, of 500,000 shares of its common stock at the public offering price of $16 per share. This $8,000,000 offering was made pursuant to a registration statement filed with the Securities and Exchange Commission ("SEC") on March 28, 1972. Empire's registration statement listed as its counsel for the offering the law firm of Sitomer, Sitomer & Porges ("Sitomer law firm").

On May 2, 1973, Dietrich Meyerhofer and Herbert Federman, on behalf of themselves and all other purchasers of Empire stock between May 31, 1972, and April 30, 1973, commenced a class action suit alleging that the registration statement and the prospectus under which the Empire stock had been issued were materially false and fraudulent. The legal theories of the suit were based upon violations of the reporting and anti-fraud sections of the Securities Act of 1933 and the Securities Exchange Act of 1934; counts involving common law negligence, fraud and deceit were also included. The focus of the alleged non-disclosure in the registration statement and prospectus centered around the existence of a $200,000 payment made by Empire to the Sitomer law firm on the day of the closing, which according to the plaintiffs constituted an unreported "finders fee".

The defendants named in the caption of the Meyerhofer complaint were Empire, certain officers and directors of Empire (sometimes hereinafter collectively referred to as the "Empire defendants"), the Sitomer law firm and its three partners, Alvin L. Sitomer, Stephen J. Sitomer and Robert E. Porges (sometimes hereinafter collectively referred to as the "Sitomer defendants"), Empire's managing underwriter, Faulkner, Dawkins & Sullivan Securities Corp. ("Faulkner, Dawkins"), certain selling shareholders of Empire, and Stuart Charles Goldberg ("Goldberg").

On May 2, 1973, the same day the original complaint in the Meyerhofer action was filed, service was made upon the Sitomer defendants and upon Faulkner, Dawkins. No service of plaintiffs' complaint was made then (or at any other time) upon Goldberg. Rather, he was advised of the existence of a filed complaint in which he was named a party defendant telephonically by plaintiffs' counsel, Bernson, Hoeniger, Freitag & Abbey ("Bernson law firm"). Thus informed, Goldberg requested and received an opportunity to meet with and prove to the Bernson law firm his non-involvement in any financial arrangements between Empire and the Sitomer law firm and his lack of knowledge thereof; and that furthermore, it had been his revelation to the SEC during January of 1973 that had first brought the matter to the attention of the SEC. The result of this meeting and of joint consultation between

plaintiffs' counsel and Goldberg on the one hand and the SEC on the other was that on May 14, 1973, plaintiffs' counsel filed an Order to Show Cause why Goldberg should not be dropped by plaintiffs as a party defendant. Over opposition from defendants, the Court on June 15, 1973, filed an Order which, inter alia, allowed the dropping of Goldberg as a captioned party defendant.

Disqualification and injunctive motions were filed against the Bernson law firm and against Goldberg by both the Empire and Sitomer defendants on June 8th and 20th, 1973, respectively. As against Goldberg the June 8, 1973 motion of Empire requested "an order pursuant to Canons 4 and 9 of the Code of Professional Responsibility" - *** "reinjoining ... Stuart Charles Goldberg from further disclosing confidential information regarding defendant Empire...." The June 20, 1973 motion of the Sitomer defendants contained the identical language as in the second quoted portion immediately above.

On August 23, 1973, your Honor filed a Memorandum Opinion (summarized in CCH Fed. Sec. L. Rep. 1973 Transfer Binder, par. 94, 152), granting defendants' motions by holding that Goldberg and plaintiffs' counsel had violaged Canons 4 and 9 of the ABA Code of Professional Responsibility, and ordering that:

> counsel for plaintiffs and Goldberg are enjoined and barred from acting as counsel or participating in any way with counsel for the plaintiffs ... and they are further enjoined from disclosing confidential information regarding Empire to others.... (Memorandum Opinion, p.11)

Memorandum of Law.

Plaintiffs' Notice of Appeal from your Honor's Memorandum Opinion dated August 23, 1973, was duly filed by the Bernson law firm on August 30, 1973. Because Goldberg was never a party to the Meyerhofer action, he had to move the United States Court of Appeals For The Second Circuit for leave to intervene, which permission was granted.

The Second Circuit heard argument on January 16, 1974, and came down with its decision on June 10, 1974, in an opinion cited as Meyerhofer v. Empire Fire And Marine Insurance Co., 497 F. 2d 1190 (2 cir., 1974), also reported in CCH Fed. Sec. L. Rep. '73 - '74 Transfer Binder, par. 94, 592. This opinion stated: "... Goldberg had the right to make an appropriate disclosure with respect to his role in the public offering." 497 F. 2d at 1195. The Court left standing Your Honor's injunction against Goldberg acting "as an attorney for a party in any action arising out of the facts herein alleged, or from disclosing material information except on discovery or at trial...." 497 F. 2d at 1196.

Between the date on which the Notice of Appeal was filed with the Second Circuit on August 30, 1973, and the date on which the Second Circuit's opinion issued on June 10, 1974, Herbert Federman and Dietrich Meyerhofer filed a second complaint on October 23, 1973, naming as defendants the Empire and Sitomer defendants plus certain selling shareholders of Empire. Goldberg was not named as a party in that

complaint. Thereafter, the Empire defendants filed a third party complaint against Goldberg on March 28, 1974. Goldberg answered this third party complaint on May 27, 1974, as amended on June 16, 1974. Because of the federal rule regarding compulsory counterclaims Goldberg was forced to bring on his defamation claim in his third party answer and counter-claim in the Federman action. After the Second Circuit's Opinion of June 10, 1974, the Federman and Meyerhofer actions were consolidated by Your Honor for all purposes.

By Order of Settlement signed by Your Honor under date of January 16, 1976, all claims by plaintiffs against all parties have been settled, as well as all claims by the Empire defendants against the Sitomer defendants and Aschkenasy, and all claims by the Sitomer defendants and Aschkenasy against the Empire defendants, and claims by the Sitomer defendants against Aschkenasy and claims by Aschkenasy against the Sitomer defendants. This was accomplished by defendant Empire contributing $160,000 and defendant Sitomer law firm contributing $625,000 to a class settlement fund.

All that now remains are the claims by the Empire defendants against Goldberg and Goldberg's claims against the Empire and Sitomer defendants and Aschkenasy.

STATEMENT OF CLAIM

THE DAMAGES FLOWING FROM YOUR HONOR'S AUGUST 23, 1973 OPINION WERE LEGALLY CAUSED BY THE WRONGFUL ACTIONS OF THOSE AGAINST WHOM GOLDBERG IS CLAIMING.

The basic reason for this recusal motion is that a substantial portion of Goldberg's damage to his reputation flowed from your Honor's August 23, 1973 Opinion. Said damages were legally caused by defendants' wrongful acts. In such a situation it would obviously create an appearance of impropriety if a judge were to sit on a case in which a substantial portion of a party's actionable damages were occasioned by that judge's former decision which was later reversed. Since the theory of Goldberg's defamation action is unusual, though not unique, a brief discussion of the law on the point will be presented.

In the leading case of Morrison v. National Broadcasting Company, Inc., 24 A.D. 2d 284, 286 (1st Dept.., 1965, Breitel, J. P.), rev'd on other grounds 19 N.Y. 2d, 453 (1967), Judge Breitel summarized the facts of the case as follows:

"The gist of the claim is that defendants, associated in various ways in television, acting in concert, falsely represented to plaintiff, a young university academic, that they were conducting an authentic and honest contest on television, a "quiz" show, when in fact it was rigged. They made these misrepresentations in order to induce his participation as a contestant. As a result of his innocent participation and the public scandals thereafter occurring, plaintiff sustained harm to his good reputation . . . ."

In finding the complaint to state a cause of action the Court focused on two central points: the wrong done to the plaintiff, and the foreseeability of his ultimate injury. As found by the Court the wrongful conduct on the part of the defendants was the placing of the plaintiff in a "hazardous position":

"[They] put him in an unduly hazardous position where his reputation might be injured, not because this was their purpose, but because they did not care what happened to him in the pursuit of their purposes for selfish gain." [24 A.D. 2d at 287]

As to the foreseeability of the resultant harm to plaintiff's reputation from placing him in such a hazardous position the Court stated:

> While the harm to plaintiff was never intended, for defendants were gambling that there would be no exposure, the risk of harm to plaintiff's reputation was known or should have been known and therefore completely foreseeable to defendants. [24 A.D. 2d at 288]

The parallel between the Morrison action and the case at bar is direct and striking. In Morrison the defendants "falsely represented to plaintiff . . . that they were conducting an authentic and honest contest on television" [24 A.D. 2d at 286]; in the case at bar the defendants falsely represented to Goldberg that they were preparing and filing a truthful and lawful registration statement with the

Securities and Exchange Commission. In Morrison the defendants "made these representations in order to induce [the plaintiff's] participation as a contestant" [Id.]; in the case at bar the defendants made the misrepresentations in order to induce Goldberg's participation as an attorney in assisting in the preparation of portions of the registration statement. In Morrison the plaintiff "as a result of his innocent participation and the public scandals thereafter occurring . . . sustained harm to his good reputation" [Id.]; in the case at bar Goldberg suffered similar injury. In Morrison, as well as the case at bar, the defendants put the plaintiff Goldberg "in an unduly hazardous position where his reputation might be injured, not because this was their purpose, but because they did not care what happened to him in the pursuit of their purposes for selfish gain." [Id., at 287]. And finally, in Morrison as well as the case at bar "the risk of harm to plaintiff's [Goldberg's] reputation was known or should have been known and therefore completely foreseeable to defendants." [Id., at 288].

A similar result to Morrison was reached in the New Jersey case of Seidel v. Greenberg, 260 A. 2d 863 (Superior Court of N.J. Law Div., 1969, Ackerman, J. S. C.), wherein an owner of a business was held liable to an employee for damages to the employee's reputation caused by the owner's burning down his business for insurance monies while the employee wound up arrested for arson. The question presented, according to the Court, was "whether the perpetrators of a crime are liable in a civil action for damages to an innocent person who was thereafter subjected to criminal prosecution for the commission of

such crime." [Id., at 864]. In holding the perpetrators of the criminal acts liable in civil damages to the innocent person, the Court recites a thorough collection of the leading authorities on tort law on this point and concludes with the following findings:

> [The defendants] never intended that their criminal acts and conspiracy should become known. Quite the contrary. They did not specifically intend that plaintiff, or any one else, be accused of criminal acts or subjected to any prosecution. [Id., at 867].
>
> * * *
>
> [I]t is clear that if defendants had not performed their criminal acts and caused the fire to be set, plaintiff would not have suffered the injuries and damages for which relief is sought. [Id, at 868]
>
> * * *
>
> Were the wrongful and intentional acts of defendants in causing the properties to be burned a "proximate and efficient cause" of the prosecution of plaintiff for burning said properties and of the damages and injuries which he suffered? In the court's opinion, they were. Certainly, so far as "causation in fact" is concerened, it is clear that they were. It is perfectly obvious that if defendants had not caused the buildings to be burned, plaintiff

> would never have been prosecuted for such burning. As a matter of log..c and fact, defendants' criminal acts in wrongfully burning the building were clearly a substantial factor in bringing about such prosecution. [Id., at 869].

Seidel was charged (and later cleared) of arson. Goldberg was found to be an ethics violator by your Honor's August 23, 1973 Opinion, which finding was later reversed by the Second Circuit in its June 10, 1974 Opinion. The harm caused both Seidel and Goldberg are similar.

The point must be emphasized that Goldberg is not in this motion basing defendants' liability upon their moving papers for his disqualification which might arguably be privileged. Rather Goldberg is saying that defendants' wrongful acts centered around their involving him in the illegal enterprise of preparing and filing a registration statement that was false and fraudulent, and that a foreseeable consequence of this wrongful involvement was his being subject to court proceedings in which adverse findings were likely.

No more hazardous activity to a lawyer's reputation could be imagined than involving him, without his knowledge, in assisting to prepare and file a false and fraudulent registration statement with the United States Securities and Exchange Commission.

Memorandum of Law.

APPEARANCE OF IMPROPRIETY

A JUDGE'S PROPRIETY AND IMPARTIALITY MIGHT REASONABLY BE QUESTIONED IF HE WERE TO FAIL TO DISQUALIFY HIMSELF FROM PRESIDING OVER A TRIAL WHEREIN A SUBSTANTIAL PORTION OF A CLAIMANT'S DAMAGES WERE OCCASIONED BY THE JUDGE'S OWN PRIOR ACTS.

According to Canon 2 of the Code of Judicial Conduct:[1]

> A Judge Should Avoid Impropriety and the Appearance of Impropriety in All His Activities.

Likewise Canon 3 provides:

> A Judge Should Perform the Duties of His Office Impartially and Diligently.

Canon 3C(1), dealing specifically with the subject of "Disqualification" sets forth the following rule:

> A judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned....

It will at the outset be noted that the content of Canon 3C is now also to be found in 28 U.S.C.A. §455.

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[1] The Code of Judicial Conduct was adopted by the House of Delegates of the American Bar Association on August 16, 1972. According to the Report of the Proceedings of the Judicial Conference of the United States (April 5-6, 1973) p. 10: "The Judicial Conference, on recommendation of the Joint Committee, adopted the Code of Judicial Conduct as thus approved to be applicable to all federal judges...."

However, since §455 does "not apply to the trial of any proceeding commenced prior to the date of this Act [December 5, 1974]...." (Pub. L. 93-512, Section 3), movant will rely upon the Code of Judicial Conduct for the purposes of this motion.

On August 23, 1973, Your Honor filed a Memorandum Opinion in the Meyerhofer action, which inter alia found Goldberg's conduct "violative of Canons 4 and 9", Opinion p. 10. As stated by Your Honor in that Opinion:

> However innocent [Goldberg's] association with the former client's adversary's counsel may have been, it clearly has the appearance of impropriety.
>
> Counsel for the plaintiffs cannot disentangle themselves from the tainted association. ...They, thus, not only encouraged but also participated in [Goldberg's] violation of Canon 4 and Canon 9. [Opinion, p. 8]

The effects upon Goldberg's reputation of Your Honor's Opinion of August 23, 1973, were swift and devastating. The front page of the New York Law Journal, New York City's only and "Official Daily Law Newspaper Designated Pursuant To The Judiciary Law" (Law Journal's banner), of August 31, 1973, carried the headline:

Lawyer, Firm Cited in U.S. Court
ETHICS VIOLATIONS FOUND IN SECURITIES OFFERING

Thereunder is carried the story that:

Memorandum of Law.

> A New York attorney and a law firm have been found by Federal Judge Lloyd F. Mac Mahon of the Southern District of New York to have violated Canons 4 and 9 of the Code of Professional Responsibility....
>
> The court's order, issued Aug. 23 enjoined Charles Stuart [sic] Goldberg....

In addition to the above quote from the Law Journal, Goldberg's name appears twenty-nine additional times in the balance of the story. As a direct result of Your Honor's Opinion, Goldberg's front page, by-line, monthly column on "Securities Law" in the New York Law Journal (which had appeared on eighteen occasions prior to August 23, 1973) was summarily taken from him with Your Honor's Opinion cited as the reason.

The damage caused Goldberg by Your Honor's Opinion of August 23, 1973, is at the core of his claim for defamation of character. During the trial of this issue it will be necessary to:

1) call upon expert witnesses to testify as to the erroneous assumptions of law that formed the bases of Your Honor's Opinion;
2) have these expert witnesses further testify as to the reversal of Your Honor's findings of unethical conduct on the part of Goldberg;
3) call upon other expert witnesses to testify as to the psychological effects upon Goldberg of Your Honor's Opinion; and
4) call upon other witnesses as to the damage done to Goldberg's reputation caused by Your Honor's Opinion.

It is movant's belief that his witnesses would be very much less than anxious to provide the above testimony

concerning a judge who was at that very moment presiding on the case and controlling the direct and cross-examination of such witnesses. Furthermore, the psychological impact upon a witness testifying before a judge with respect to that very same judge's error is immeasurable. Moreover, the obvious effect upon a jury charged with fact determination in a case involving that very judge who is presiding would deprive Goldberg of his right to an impartial jury trial.

Furthermore, throughout the course of the trial, the presiding judge will be required to issue instructions regarding testimony and exhibits as well as eventually to issue the charge to the jury. Since these rulings and charges will to a great degree relate to Goldberg's damages occasioned by Your Honor's former decision which was later reversed, the appearance of impropriety and partiality "might reasonably be questioned."

In the leading case of United States v. Columbia Broadcasting System, 497 F. 2d 107 (5 Cir., 1974), the United States Court of Appeals for the Fifth Circuit was faced with a situation in which the trial judge found the defendant guilty of criminal contempt for violating verbal, unrecorded orders of the trial judge banning publication of sketches of courtroom scenes. In reversing the conviction, the Court enunciated a policy of protecting the "integrity and dignity of judicial process", a statement which has relevance for the motion now before Your Honor:

> We are faced with the unusual setting of a judge trying a case in which he was a principal actor in the factual issues to be determined. Essential to the proof of the prosecution's case were acts committed by the judge himself ....
>
> ***

> The guarantee to the defendant of a totally fair and impartial tribunal, and the protection of the integrity and dignity of the judicial process from any hint or appearance of bias is the palladium of our judicial system. [Id, at p. 109, (emphasis added)]

In another case involving the trial of a contempt citation, which was reversed on appeal, Mr. Justice Black, in In Re Murchison, 349 U.S. 133, 136, 75 S. Ct. 623, 625, 99 L. Ed. 942 (1955), aptly phrased the Court's concern not only for "justice" but for the "appearance of Justice":

> "A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness. To this end no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome. That interest cannot be defined with precision. Circumstances and relationships must be considered. This Court has said, however, that 'Every procedure which would offer a possible temptation to the average man as a judge * * * not to hold the balance nice, clear, and true between the State and the accused denies the latter due process of law.' Tumey v. Ohio, 273 U.S. 510, 532, [47 S. Ct. 437, 441, 71 L. Ed. 749]. Such a stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties. But to perform its high function in the best way 'justice must satisfy the appearance of justice.' Offutt v. United States 348 U.S. 11, 14, [75 S. Ct. 11, 13, 99 L. Ed. 11.]."

Mr. Justice Black's concern for the "appearance of justice", had been previously shared by Mr. Justice Frankfurter, in Public Utilities Commission v. Pollack, 343 U.S.

451, 466-467, 72 S. Ct. 813, 822-823, 96 L. Ed. 1068 (1952), wherein he stated that "the administration of justice should reasonably appear to be disinterested as well as be so in fact":

> "The judicial process demands that a judge move within the framework of relevant legal rules and the covenanted modes of thought for ascertaining them. He must think dispassionately and submerge private feeling on every aspect of a case. There is a good deal of shallow talk that the judicial robe does not change the man within it. It does. The fact is that on the whole judges do lay aside private views in discharging their judicial functions. This is achieved through training, professional habits, self-discipline and that fortunate alchemy by which men are loyal to the obligation with which they are entrusted. But it is also true that reason cannot control the subconscious influence of feelings of which it is unaware. When there is ground for believing that such unconscious feelings may operate in the ultimate judgment, or may not unfairly lead others to believe they are operating, judges recuse themselves. They do not sit in judgment. They do this for a variety of reasons. The guiding consideration is that the administration of justice should reasonably appear to be disinterested as well as be so in fact."

A judge's self-disqualification in a case involving the appearance of impropriety is not a decision easily reached. In United States v. Quattrone, 149 F. Supp. 240, 242 (D.D.C., 1957), Judge Youngdahl struggled with just such a problem and reasoned:

> As a general rule, voluntary disqualification is an appropriate remedy in cases in which it may reasonably appear that the determination of the issues by the judge concerned might be improper, even though the facts do not support such a supposition.
>
> * * * *

Memorandum of Law.

"The Court does not believe that any general principles can be laid down concerning the degree to which an appearance of bias, interest, or improper motive must exist before voluntary disqualification becomes desirable in any particular case. The availability of other judges, the inconvenience or prejudice to the public or parties which may result from the delay, the importance of the issues involved in the case, the nature of the actions which give rise to the appearance of partiality, and many other factors all may be relevant. Furthermore, it would be presumptuous for this court to attempt to lay down any general test. For the decision as to voluntary disqualification, perhaps more than any other decision, is one to be made in accordance with the dictates of the conscience of the individual judge - and this Court's personal convicitions can be of little assistance to others.

"Concededly, in this case the appearance of judicial impropriety which would result from this Court's retention of jurisdiction would not be great. On the other hand, other judges are readily available, and the delay and inconvenience resulting from this Court's voluntary disqualification would be negligible. In balancing these factors the Court has taken into consideration the fact that confidence in the Judiciary is essential to the successful functioning of our democratic form of government. That form of government could not long survive if citizens could not have faith in the impartiality of judges. Though the making of this decision has been a most unpleasant task, the Court believes that a proper application of the standards governing the administration of criminal justice leaves no alternative. For those standards require the most scrupulous concern for appearances as well as for facts. In this regard the Court believes the following statement to be particularly pertinent: 'Criminal justice is concerned with the pathology of the body politic. In administering the criminal law, judges wield the most awesome surgical instruments of society. A criminal trial, it has well been said, should have the atmosphere of the operating room. The presiding judge determines the atmosphere. He is not an umpire who enforces the rules of the game, or merely a moderator between contestants. If he is adequate to his functions, the moral authority which he radiates will inspire the indispensable standards of dignity and austerity upon those who participate in a criminal trial.'

Memorandum of Law.

> In view of the appearance of impropriety, in view of the minimal inconvenience which would result from the assignment of another judge to this case and in view of the rigid standards which must govern the administration of criminal justice, the Court is of the firm belief that it must voluntarily disqualify itself from any further proceedings in this case. Accordingly, the motion will be reassigned for argument before another judge.

In the same vein, in disqualifying himself in United States v. Zarowitz, 326 F. Supp. 90, 92, 94 (C. D. Cal. 1971), Judge Hauk made the following perceptive observations:

> [A] circumspect and punctilious devotion to the ideal of justice in the abstract as it appears to the public at large, as well as the ideal of fairness as it is applied concretely in the case before us, affirms our determination to disqualify and recuse ourself. Like Caesar who parted from his wife Pompeia because she was not above suspicion [citing Plutarch, "Lives: Caesar" and "Roman Apothegms", Bartlett's Familiar Quotations, 1114 (12th ed. 1952)], so here to avoid even the appearance of the possibility of personal bias or prejudice, wise discretion and sound judgment compel us to leave this case, however reluctant we are to thrust its burden upon another Judge of our Court or to cause any delay or inconvenience to the parties.
>
> * * *
>
> Still, a good conscience founded upon the Golden Rule of doing unto others as you would have them do unto you triggers the ineluctible and inevitable determination which we here and now must enunciate in withdrawing from the case. We are strengthened by the knowledge that under our Court's General Order No. 104 the Judge to whom the case is reassigned has the privilege of sending to us a case of equal magnitude and complexity from his own case load, and we are fortified by the fact that the parties with the consent of the new Judge may retain the present schedule of pretrial hearing and jury trial dates already set....

Finally, in closing, the Court is respectfully referred to Your Honor 's statement which appears on page 7 of your August 23, 1973 Opinion:

> The appearance of propriety may be as necessary as the fact.

Memorandum of Law.

TIMELINESS

THE WITHIN MOTION FOR RECUSAL HAS BEEN TIMELY MADE AS IT COMES WITHIN 45 DAYS OF THE SETTLEMENT OF THE CASE IN CHIEF AND BEFORE ANY OTHER MOTION HAS BEEN MADE REGARDING THE REMAINING CONTROVERSY.

As more fully set forth in the preceding Statement of Facts, the complaint in the Meyerhofer action was filed on May 2, 1973. Although Goldberg had been named in the caption of the action he was never served and his name was subsequently dropped from the complaint by order of Your Honor dated June 15, 1973. On August 23, 1973, Your Honor dismissed the complaint in an Opinion which also found Goldberg to have violated Canons 4 and 9 of the Code of Professional Responsibility. As of the date of the dismissal of the Meyerhofer action, Goldberg had never been a party to the action nor had he ever appeared before Your Honor or been deposed as a witness. Goldberg's sole participation in the case up to that date was limited to his having supplied plaintiffs' counsel (as well as Empire's counsel) with a copy of his January 26, 1973 SEC Affidavit, his having met with plaintiffs' counsel, and his having filed affidavits with the Court under dates of June 12 and 21, 1973.

On October 23, 1973, a new action was commenced (the "Federman action"). Goldberg was not made a party defendant in this second action.

Goldberg first became a party in the Federman action when, on March 28, 1974, he was served with a third party complaint by Empire. Goldberg subsequently filed his Answer and Cross-Claims on May 27, 1974, and then his Amended Answer and Cross-Claims on June 16, 1974. These cross-claims were against Empire and its directors, the Sitomer law firm and its partners and against Aschkenasy.

On June 10, 1974, the United States Court of Appeals for the Second Circuit reversed the dismissal of the Meyerhofer action, finding no violation on the part of any attorney of Canons 4 and 9 of the Code of Professional Responsibility. Thereafter, the Meyerhofer and Federman actions were consolidated by Your Honor for all purposes.

Settlement of the claims by the plaintiffs against all defendants, wherein Empire contributed $160,000 and the Sitomer law firm contributed $625,000 to a settlement fund, was approved by Your Honor in a Memorandum Opinion filed on January 19, 1976.

Remaining at this time are the claims of Empire against Goldberg and the claims of Goldberg against Empire and its officers, the Sitomer law firm and its partners, and Aschkenasy.

This motion for recusal, filed on March 1, 1976. is within 45 days of Your Honor's Memorandum Opinion

regarding approval of the settlement between plaintiffs and defendants filed under date of January 19, 1976.

A motion for recusal made on behalf of Goldberg at an earlier time, e.g. before plaintiffs had settled the main action, could only have resulted, if successful, in a severance of Goldberg's cross-claims. The actions against Goldberg would have survived since the motion for recusal is based solely upon the issue of the damages suffered by Goldberg occasioned from Your Honor's August 23, 1973 Opinion. Therefore, severance would not in any way have saved any of Your Honor's time; the main case would have proceeded in exactly the same fashion as it did. All that would have been accomplished would be that Goldberg would now be faced with two lengthly and costly trials instead of one.

The motion to recuse, coming as it does on the heels of the settlement in the main case, prejudices no one. Discovery is virtually if not actually at an end. The issues are now exclusively between Empire and Goldberg on the one hand and Goldberg and the Empire and Sitomer defendants and Aschkenasy on the other. Your Honor has disposed of all of plaintiffs' securities claims and the remainder actions may now be fairly sent on to another judge for trial of the remaining issues.

Memorandum of Law.

WAIVER

DISQUALIFICATION PURSUANT TO CANONS 2 AND 3 AND 3C OF THE CODE OF JUDICIAL CONDUCT IS NOT SUBJECT TO WAIVER ON THE PART OF THE PARTY LITIGANTS.

Unlike other provisions concerning judicial disqualification, the language of Canons 2 and 3 and specifically 3C of the Code of Judicial Conduct is directed entirely at the judge, and is mandatory. When dealing with similar provisions regarding judicial conduct, such as 28 U.S.C.A. §455 (effective for cases commenced after December 5, 1974, and embodying the exact language of Canon 3C(1) as §455 (a)) the courts have even gone so far as to hold that a denial of a Rule 60(b) motion to vacate a judgment based on 28 U.S.C.A. §455 does not dispose of the matter when additional facts are brought forward in a subsequent motion to vacate: the courts conclude that the traditional doctrines of res judicata and collateral estoppel are inapplicable because "the purity of the judicial process and its institutions is ... at stake." Kinnear - Weed Corp. v. Humble Oil & Refining Co., 403 F. 2d 437, 439-40 (5th Cir. 1968). See also Note, "Disqualification of Judges And Justices In The Federal Courts," 86 Harv. L. Rev. 736, 738-39, n. 14 (1973).

Memorandum of Law.

CONCLUSION

In a time as troubled as our own, with the citizenry's respect for our most revered institutions questioned at almost every level, the appearance of propriety on the part of our nation's judiciary is paramount. In the instant case, where regrettably Your Honor's former decision resulted in a substantial portion of claimant's injuries, for Your Honor to preside over the trial, your "impartiality" in the words of Canon 3C of the Code of Judicial Conduct" might reasonably be questioned."

Accordingly, movant very respectfully requests Your Honor recuse himself from presiding over this case and transfer and return it to the Clerk of the United States Court for the Southern District of New York for reassignment to another federal judge in the Southern District of New York.

Respectfully submitted,

THAL & YOUTT
Attorneys for defendant Stuart
Charles Goldberg in his capacity
as cross-claimant
919 Third Avenue
New York, New York 10022

Endorsement, December 3, 1976.

Federman v. Empire Fire & Marine Ins. Co. et al.

ENDORSEMENT
73 Civ. 1940 (LFM)

In considering the within motion, we exclude and do not consider any matters outside the face of the amended answer of additional defendant Goldberg, for, if anything is clear in this confused litigation, it is that the case is not ripe for summary judgment or judgment on the pleadings. We, therefore, treat the within motion as one under Rule 12(b)(6), Fed.R.Civ.P., to dismiss the counterclaim and cross-claim alleged in paragraphs 41 through 44 and 45 through 48 of the amended answer for failure to state a claim upon which relief can be granted.

Addressing not the argumentative statements and conclusions in the affidavits, memoranda and other matter presented but the face of the amended answer, we find that it fails to allege either any intentional or negligent act, omission or conduct on the part of the defendants named in either the counterclaim or cross-claim which inflicted causally-connected injuries upon Goldberg. Absent such an allegation, additional defendant Goldberg's reliance on the cases involving non-conventional torts is misplaced. If Goldberg has a claim for non-conventional tort, he ought to be able to state it so that the parties and the court know what it is.

Accordingly, the above-described counterclaim and cross-claim are dismissed, with leave to serve and file a further amended answer pleading such claims, if any, within twenty (20) days.

So ordered.

Dated: New York, N.Y.
December 3, 1976

DEC 7 1976

Lloyd F. MacMahon
LLOYD F. MacMAHON
United States District Judge

MICROFILM
DEC 0 7 1976

Amendment to Amended Answer of Additional Defendant Stuart Charles Goldberg.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

HERBERT FEDERMAN and DIETRICH MEYERHOFER,	:	
Plaintiffs,	:	
-against-	:	73 Civ. 1940 L.F.M., U.S.D.J.
EMPIRE FIRE AND MARINE INSURANCE COMPANY, et al.,	:	
Defendants,	:	AMENDMENT TO AMENDED ANSWER OF ADDITIONAL DEFENDANT STUART CHARLES GOLDBERG
-and-	:	
STUART C. GOLDBERG and JACOB ASCHKENASY,	:	
Additional Defendants on Cross-Claims	:	

In conformity with the leave granted by the Court in its memorandum and order dated December 3, 1976, the defendant Professor Stuart Charles Goldberg (hereafter Professor Goldberg) by his attorneys Thal & Youtt, hereby amends his "Amended Answer of Additional Defendant Goldberg to Cross-Claims of Defendants Empire, et al. and Cross-Claims" presently on file in this action by deleting paragraphs 41 through 48 thereof, together with the prayer of said Amended Answer and substituting in place of said paragraphs, the following:

FIRST CROSS-CLAIM AGAINST ALVIN LESTER SITOMER, STEPHEN JOEL SITOMER, ROBERT E. PORGES, JACOB ASCHKENASY, AND FIRST COUNTER CLAIM AGAINST EMPIRE FIRE AND MARINE INSURANCE COMPANY, GARY O. GROSS, AND YALE J. KAPLAN FOR INJURIOUS INVOLVEMENT

Amendment.

41a. At all times material hereto, defendants Alvin Lester Sitomer, Stephen Joel Sitomer and Robert E. Porges were partners engaged in the practice of law as Sitomer, Sitomer & Porges (hereafter referred to as the "Law Firm") and additional defendant Jacob Aschkenasy was associated with said Law Firm. Said defendants and additional defendant are hereafter collectively referred to as the "Law Firm defendants." At all times material hereto, Defendant Aschkenasy was the Law Firm attorney in charge of legal work performed by the Law Firm on behalf of the Empire Fire and Marine Insurance Company in connection with the registration of securities for public offering, and his name appeared as such upon the face of a registration statement filed on or about May 31, 1972 in connection with such a public offering.

42a. Upon information and belief, at all times material hereto, defendant Empire Fire and Marine Insurance Company ("Empire") is and was a corporation organized and existing under the laws of the State of Nebraska.

43a. Upon information and belief, at all times material hereto, defendants Gary O. Gross and Yale J. Kaplan were officers and directors of Empire. (Defendants Empire, Gross and Kaplan are referred to hereafter collectively as the "Empire Defendants").

Amendment.

44a. Between November 15, 1971 and January 21, 1973, Professor Goldberg was associated with the Law Firm and performed services on behalf of some of its clients, including Empire.

45a. On information and belief, at all times material hereto, in connection with the allegations set forth hereunder, the Law Firm defendants and the Empire defendants conspired, one with the other, to violate the Securities laws and regulations and criminal statutes of the United States by filing a fraudulent registration statement with the Securities and Exchange Commission ("S.E.C."), by fraudulently offering Empire securities to the public, through the concealing of the character, nature, and details of a certain legal fee agreement providing for the payment of fees to the Law Firm by Empire upon the contingency of a successful public offering of Empire securities, and by the concealing of information regarding the conditional nature of a purchase of stock from Empire by the Law Firm, which conspiracy, as is further detailed hereunder, resulted in substantial injury and damage to Professor Goldberg.

46a. On information and belief, at all times material hereto, the Law Firm defendants and the Empire defendants knew, or reasonably should have known, that a contingent fee

of this type was in the nature of a finder's fee, and a conditional stock purchase as was involved here was in the nature of a stock option, which in light of applicable securities regulations, was required to be reported and disclosed in the registration statement and prospectus in connection with the public offering of Empire securities at issue in this lawsuit. One of the objects of the conspiracy alleged herein was to avoid such reporting and disclosure.

47a. On information and belief, the Empire defendants authorized, approved, ratified, and/or knowingly acquiesced in the conduct and representations of the Law Firm Defendants which are set forth hereunder, and all said conduct and representations by the Law Firm defendants took place in furtherance of the said conspiracy.

48a. Moreover, on information and belief, the Empire defendants specifically engaged in acts in furtherance of the said conspiracy by concealing the fee agreement and stock take-out letter, attempting to destroy copies of the fee agreement, and by signing, approving and authorizing the filing of the Empire S-1 Registration Statement and prospectus without the necessary reports and disclosures concerning the nature of the legal fees paid to the Law Firm.

49a. Soon after becoming employed by the Law Firm on or about November 15, 1971, Professor Goldberg was informed

Amendment.

by members of the firm that the firm was already actively engaged in performing the legal work necessary to prepare and file an S-1 Registration Statement in connection with a public offering of securities to be made by its client Empire. At that time, Professor Goldberg was asked to do certain legal work and render certain opinions concerning the impending registration concerning several matters, including the matter of the obligation to report the firm's fee at the time of the registration. He was advised that the law firm was receiving a legal fee in the amount of $250,000 for the legal work required. He was further advised that such a fee would cover services in connection with the preparation of the registration statement and also pre-registration services to prepare Empire for its registration and public offering. He was also advised that at a later date an allocation of the fees attributable to pre-registration preparatory work and to actual registration work would be made. At the same time, Professor Goldberg was also advised that the firm would also receive 200 shares of stock from Empire prior to the filing of the Registration Statement. (Due to a later stock split, the quantity of stock actually received by the Law Firm in this aspect of the transaction was 14,982 shares.)

50a. Because of the size of the fee, and because of the nature of the services provided by the Law Firm, which

included negotiating with underwriters, Professor Goldberg inquired at a Law Firm meeting attended by the Law Firm defendants whether or not the legal fee was contingent upon a successful public offering and could therefore be a finder's fee. Such a characterization would impose substantial reporting and disclosure requirements in the registration process, which would in turn jeopardize the approval of the registration, together with the ultimate success of the public offering. In response to Professor Goldberg's inquiries, he was specifically told by defendants Alvin Sitomer, Stephen Sitomer and Robert Porges that the fee was not contingent. Beyond this, said partners merely stated, without further explanation, that the establishment of fees at the firm, including the Empire fee at issue herein, was a matter exclusively for the partners of the firm.

51a. In reliance upon the representations set forth above in paragraph 50a, Professor Goldberg continued to perform legal services and to render opinions concerning, among other things, the reporting and disclosure considerations concerning the Empire legal fee. Such services by Professor Goldberg included, among other things, his telephonic communication with the S.E.C. in Washington on January 20, 1972, to obtain information as to whether a substantial but non-contingent fee such as the Empire fee would be treated as a

finder's fee during which telephone conversation Professor Goldberg repeated to an officer of the S.E.C. information concerning the non-contingent nature of the fees which proved to be false and fraudulent, and the preparation of a written memorandum of law concerning this issue on January 24, 1972.

52a. Later, during the early months of 1972, Professor Goldberg was assigned to review a preliminary draft of the Empire registration statement, with specific emphasis upon the disclosure of the Law Firm's purchase of shares of stock from Empire. As part of his review, and in order to ascertain the details of what must be disclosed on the registration statement concerning the stock purchase, he inquired in a meeting attended by the Law Firm defendants whether or not the stock was fully paid for and owned unconditionally In response, he was told that the stock was fully paid for and unconditionally owned.

53a. Thereafter, Professor Goldberg was advised, prior to May 31, 1972, the effective date of the Empire registration statement, that full disclosure of the details of the legal fees and stock purchase by the Law Firm had been made in the registration statement and offering prospectus, including an allocation of the fees between preparatory legal services and legal services in connection with the preparation of the registration statement.

Amendment.

54a. The representations made to Professor Goldberg that the amount of the fee was fixed and non-contingent as set forth in paragraph 50a were false when made, and, on information and belief, were known to be false by defendants Alvin Sitomer, Stephen Sitomer, Robert Porges, and Jacob Aschkenasy. The true facts were that a written fee agreement with the firm's client Empire provided for the payment of a fee, contingent upon the successful contemplation of a public offering of Empire securities and was in the amount of 2-1/2 percent of the "gross public offering price" of the securities. On information and belief, such true facts were deliberately withheld from Professor Goldberg, and the deliberate misrepresentations set forth in paragraph 50a above, were made by defendants Alvin Sitomer, Stephen Sitomer, Robert Porges, and Jacob Aschkenasy, acting as conspirators with one another and as co-conspirators with the Empire defendants as part of their joint device and scheme to violate the Securities laws and criminal statutes of the United States, by concealing the finder's fee arrangement which existed between Empire and the Law Firm and thereby avoiding the necessity of disclosing such a finder's fee as such in the registration statement and the public offering prospectus.

55a. The representations made to Professor Goldberg that the Empire stock purchased by the Law Firm was fully

paid and owned unconditionally as set forth in paragraph 52a were false when made and, on information and belief, were known to be false by defendants Alvin Sitomer, Stephen Sitomer, Robert Porges and Jacob Aschkenasy. The true facts were that Empire, with the knowledge of the Law Firm defendants, had guaranteed in writing a loan made by the Bank of Commerce to the Sitomer firm,collateralized by the Empire stock. If these facts had been revealed, the stock could have been deemed a stock option and finder's stock, with the resulting necessity of adequate disclosure in the registration statement and prospectus. Further, had such stock been deemed to be finder's stock, it would not have been immediately saleable by the Law Firm partners following the public offering, thereby substantially diminishing its value to the Law Firm. On information and belief, such true facts were deliberately withheld from Professor Goldberg, and the deliberate misrepresentations set forth in paragraph 52a above, were made by defendants Alvin Sitomer, Stephen Sitomer, Robert Porges and Jacob Aschkenasy, acting as conspirators with one another and as co-conspirators with the Empire defendants as part of their joint device and scheme to violate the Securities laws and criminal statutes of the United States by concealing the stock option and finder's nature of the stock purchase and thereby avoiding the necessity of its disclosure in the registration statement and public offering prospectus.

Amendment.

56a. The aforedescribed conduct by said defendants had the natural and probable effect of intentionally and knowingly exposing Professor Goldberg to the unreasonable risk of substantial harm and damage in the event that such a scheme to violate the Securities laws and/or criminal statutes would be discovered and exposed, as it subsequently was. Moreover, said conduct created a condition in which it was reasonably foreseeable that Professor Goldberg would be mistakenly implicated in the violation of the Securities laws and criminal statutes.

57a. Professor Goldberg did not learn of the untruth of said misrepresentations until on or about January 20, 1973, after his suspicions were aroused concerning the law firm's fee arrangements with other clients, including the Glacier General Assurance Company ("Glacier"). At that time, upon conducting a further investigation and after confronting the defendants Alvin Sitomer, Stephen Sitomer and Robert Porges with the fruits of such investigation, said defendants admitted that they had lied about the contingent nature of the Empire fee. Thereupon, Professor Goldberg immediately endeavored to persuade, among others, defendants Alvin Sitomer, Stephen Sitomer, Robert Porges and Jacob Aschkenasy and, through them, Empire and the Empire defendants, to immediately disclose to the S.E.C. the details of their wrongful conduct in failing to properly report the finder's fee in the registration statement, which said defendants refused to do.

Amendment.

58a. Instead, on information and belief, the Law Firm defendants devised a cover-up scheme, which included the destruction of certain client files, the creation of new client files, the concealment of the Empire written guarantee and take-out letter, and the creation of an elaborate cover story to excuse and justify the similar finder's fee arrangement with another client, Glacier, by perjuriously swearing that there were no other similar agreements. When Professor Goldberg refused to go along with the cover-up, defendant Stephen Sitomer specifically threatened that if Professor Goldberg were to go to the S.E.C., the Law Firm defendants would use Professor Goldberg's memorandum of January 24, 1972, to make it appear contrary to fact that he had engineered the entire scheme to conceal the finder's fee.

59a. Thereupon, on January 22, 1973, Professor Goldberg himself took such steps as were necessary, proper and legally and ethically mandated by securities laws and regulations, criminal statutes, and by professional ethics, by appearing at the offices of the S.E.C. and making disclosure, inter alia, of the Empire finder's fee information. Based upon the information supplied by Professor Goldberg, the S.E.C. subsequently commenced an investigation which later resulted in judicial proceedings against defendant Law Firm, Alvin Sitomer, Stephen Sitomer, Robert Porges, Empire and the individual Empire defendants.

60a. As a direct and immediate consequence of the afore-described scheme by the Law Firm defendants and Empire defendants to violate the Securities laws by failing to disclose the finder's fee and conditional stock purchase by the Law Firm in the Empire Registration Statement, Professor Goldberg has suffered substantial injury and damage in the following respects:

(i) Professor Goldberg was forced to resign his employment, and he has been unable to obtain employment in the private practice of law specializing in securities work. Between January 21 and September 1, 1973, he was unable to obtain any employment, thus resulting in lost income in the amount of $16,187. Since that time, he has been unable to obtain employment in a Law Firm as a securities attorney, which condition on information and belief shall persist for the remainder of his professional career, thus resulting in impairment of earnings damages in the amount of $850,000. On information and belief, his inability to obtain such employment is based in some instances upon the fact that prospective employers have assumed or would assume, contrary to fact, that Professor Goldberg might have been a knowing and active participant in the Securities law violations alleged above, and in other instances upon the fact that prospective employers are unwilling to hire an attorney who has been the subject of controversy in a Securities scandal. Accordingly, Professor

Goldberg has suffered and continues to suffer substantial losses. Moreover, during his attempts to secure employment after the events complained of herein, Professor Goldberg suffered severe emotional and mental pain and suffering in being rejected for employment.

(ii) Professor Goldberg was immediately terminated as a front page by-line securities law columnist with the New York Law Journal, a position he had held for approximately two years, on the stated ground that he was implicated in a securities scandal. As a consequence, Professor Goldberg has suffered injuries which are more fully described in subparagraph (x) below.

(iii) Professor Goldberg became the brunt of a malicious campaign of vilification and ridicule directed by defendants Alvin Sitomer, Stephen Sitomer, Robert Porges, and Jacob Aschkenasy, which included, inter alia, the exhibition to members of the professional community of an offensive blackboard caricature of Professor Goldberg. As a consequence, Professor Goldberg has suffered injuries which are more fully described in subparagraph (x) below.

(iv) Professor Goldberg became the subject of numerous assertions, which, on information and belief, were initiated by defendants Alvin Sitomer, Stephen Sitomer, Robert Porges, and Jacob Aschkenasy, to the effect that Professor Goldberg had been a knowing and culpable wrongdoer in the conduct which constituted the securities law violations set forth herein.

Amendment.

As a consequence, Professor Goldberg has suffered injuries which are more fully described in subparagraph (x) below.

(v) Professor Goldberg became one of the subjects of the investigation by the S.E.C. into the Securities violations set forth above, which investigation resulted in his complete exoneration of any wrongdoing and which culminated in an injunction enjoining defendants Alvin Sitomer and Stephen Sitomer from further violating the Securities laws as alleged herein and in their disbarment from practice before the S.E.C. As a consequence, Professor Goldberg has been forced to incur legal fees in excess of $3,965 to present his position before the S.E.C. in addition to the injuries more fully described in subparagraph (x) below.

(vi) Professor Goldberg became the subject of a bar association grievance investigation into the question whether by reporting the securities violations set forth herein to the S.E.C. and communicating certain information to adversary counsel in related civil litigation, he had violated the Code of Professional Responsibility by divulging confidential client communications, which investigation resulted in his complete exoneration. As a consequence, Professor Goldberg has suffered injuries which are more fully described in subparagraph (x) below.

(vii) Professor Goldberg has been named as a cross-defendant in this action by the Empire defendants

based inter alia, upon his alleged malpractice and violation of the Code of Professional Responsibility. As a consequence, he has been forced to incur legal fees and expenses in excess of $8,174.39 in defense of this action, in addition to the injuries more fully described in subparagraph (x) below.

(viii) In a motion brought in a related civil action, Professor Goldberg was erroneously held to have violated the Code of Professional Responsibility (Canons 4 and 9) in that he

> "disclosed confidential communications of a former client to attorneys representing parties bringing suit against that client, and associated with the former client's adversary in such manner as to give the appearance of impropriety."

which holding was later reversed by the Second Circuit Court of Appeals, 497 F.2d 1190 (2d Cir. 1974). A petition for a writ of certiorari to the Supreme Court for review of the Court of Appeals decision was denied, 419 U.S. 998. As a consequence, Professor Goldberg has been forced to incur substantial inconveniences, a moral obligation to pay the time charges on pro bona legal services of $10,610, and expenses of $216.54 in his successful efforts to clear his name and erase the erroneous finding of ethical misconduct, in addition to the injuries more fully described in subparagraph (x) below.

(ix) Professor Goldberg has been made to suffer substantial adverse notoriety in both the general public media and in professional legal publications, including but not limited to the following:

Amendment.

a) Lipman, The SEC's Reluctant Police Force: A New Role for Lawyers, 49 N.Y.U.L.Rev. 437, 439 n. 9 (1974), (authored, incidentally, in apparent violation of D R 7-107 (G) and (H) of the Code of Professional Responsibility by a member of the law firm then representing the defendant Law Firm and its three named partners before the S.E.C.) in which Professor Goldberg is asserted

> "to have apparently gained immunity from an SEC enforcement action by outracing both his partners and his client to the Commission."

thereby erroneously implying that Professor Goldberg, as a culpable wrongdoer, had been the first to seek and obtain immunity.

b) T. Morgan & R. Rotunda, Problems and Materials on Professional Responsibility, 315 (Foundation Press 1976), in which the statement quoted in paragraph 60a(ix)(a), supra, was reprinted without any indication of its clearly erroneous nature.

c) A front-page article in the New York Law Journal, August 31, 1973, entitled "Ethics Violations Found in Securities Offering," wherein the erroneous holding mentioned in paragraph 60a(viii), supra, was discussed at great length, and wherein Professor Goldberg's name was recited in connection therewith approximately thirty (30) times.

Such publications have also been a cause of the injuries more fully described in subparagraph (x) below.

(x) In addition to the injuries, expenses and loss of income described above, Professor Goldberg has also suffered

the following injuries by reason of the consequences described in paragraph 60a(i) through (ix).

(1) Substantial damage and injury to his professional and personal reputation, in addition to loss of income and income potential as set forth in Paragraph 60a(i), in the amount of $150,000.

(2) Severe mental and emotional pain and suffering in the amount of $1,000,000;

(3) Physical pain and suffering from an asthmatic condition triggered by his emotional reaction to the events complained of herein in the amount of $10,000; and

(4) Medical expenses attributable to (2) and (3) above in the amount of $610.

SECOND CROSS-CLAIM AND COUNTERCLAIM AGAINST LAW FIRM DEFENDANTS AND EMPIRE DEFENDANTS FOR FRAUD

61a. Professor Goldberg repeats and realleges the allegations contained in paragraphs 41a through 60a, the same as if they were fully set forth herein.

62a. On information and belief, such misrepresentations as have been set forth above in paragraphs 50a and 52a were made to Professor Goldberg by defendants Alvin Sitomer, Stephen Sitomer, Robert Porges and Jacob Aschkenasy in conspiracy with one another and as part of their conspiracy with the Empire defendants, in order to dupe and deceive Professor Goldberg to induce him to communicate falsely with the S.E.C. and to render opinions favorable to the Empire defendants and the Law Firm defendants in connection with the legal fee and stock purchase disclosure issues.

Amendment.

63a. On information and belief, the representations so made were known by defendants Alvin Sitomer, Stephen Sitomer, Robert Porges and Jacob Aschkenasy to be false when made and were made with the intent to deceive and defraud Professor Goldberg and to induce him to render legal services on behalf of Empire, to form and give legal opinions on behalf of Alvin Sitomer, Stephen Sitomer and Robert Porges and Empire that the fee arrangement and stock option did not have to be reported in the contemplated registration statement under applicable Securities law and regulations and to act on behalf of Alvin Sitomer, Stephen Sitomer and Robert Porges and Empire in communicating with the Securities and Exchange Commission and others concerning Empire's registration and reporting requirements.

64a. On information and belief, among the purposes of defendants in making said misrepresentations was to obtain a favorable opinion from Professor Goldberg that the Empire fee was not a finder's fee to conceal and avoid disclosure of the conditional stock option purchased from Empire. In such fashion, said defendants contrived to use Professor Goldberg as a front and a scapegoat to conceal and justify their failure to disclose the finder's fee and stock option on the Empire Registration statement and prospectus.

65a. At the time such representations were made, Professor Goldberg did not know that they were untrue, but

believed the representations to be true and relied upon them and was thereby induced to continue in the employment of Alvin Sitomer, Stephen Sitomer and Robert Porges, to provide erroneous information to the S.E.C and to others concerning the Empire securities offering, and to continue to render legal services in connection with the Empire registration as described above in paragraphs 49a-53a.

66a. As a direct, immediate and proximate consequence of his reliance upon the foregoing fraudulent misrepresentations, Professor Goldberg has suffered substantial injury and damage as specifically set forth above in paragraph 60a.

THIRD CROSS-CLAIM AGAINST DEFENDANTS
ALVIN SITOMER, STEPHEN SITOMER AND
ROBERT PORGES FOR BREACH OF WARRANTY

67a. Professor Goldberg repeats and realleges the allegations contained in paragraphs 41a through 66a, the same as if they were fully set forth herein.

68a. At or about the time he first became employed at the Law Firm in November, 1971, and in the negotiations and discussions immediately preceding that employment, defendants Alvin Sitomer, Stephen Sitomer and Robert Porges expressly and impliedly represented and warranted to Professor Goldberg that they were competent and ethical attorneys engaged in, among other things, the practice of corporate and securities regulation law. As part of said express and implied representations and warranties, defendants Alvin Sitomer, Stephen

Sitomer and Robert Porges represented and warranted that as attorneys, they adhered to the requirements of the Code of Professional Responsibility as adopted by the American and New York State Bar Associations and observed and abided by the applicable regulations of the Securities and Exchange Commission.

69a. Indeed, on such occasions, Professor Goldberg and defendants Alvin Sitomer, Stephen Sitomer and Robert Porges discussed at length Professor Goldberg's interest in and concern with the need for a punctilious adherence to high ethical standards among the members of the bar specializing in Securities law. On such occasions, he was encouraged to continue his research and writing for publication in legal periodicals and treatises on legal ethics issues affecting the practice of Securities law. Moreover, on such occasions, Professor Goldberg was specifically assured that his high ethical standards would be welcome and would find a welcome climate at the Law Firm.

70a. Professor Goldberg relied upon the above-described representations and warranties in determining to accept employment with the Law Firm. Moreover, he also relied upon said representations and warranties in performing legal services for the firm's clients and in publishing one book and several articles during his tenure of employment concerning ethical standards in Securities law, including the following:

1) Expanding Responsibilities Under the Securities Acts, (Editor), New York Law Publishing Co., 350 pages (1973);

2) "Attorneys' Responsibility to Third Parties: The National Student Marketing Case" N.Y.L.J., March 10, 1972

3) "Practicing Before the S.E.C. Commission's Rules of Practice -- Rule 2(e)" N.Y.L.J.; April 14, 1972; and

4) "Certified Public Securities Attorney" N.Y.L.J., December 8, 1972.

71a. Upon information and belief, these warranties were false, broken, breached and violated in the following respects:

i) Defendants Alvin Sitomer, Stephen Sitomer and Robert Porges, with others, engaged in the knowing violation of Securities laws complained of in the First and Second Causes of Action as alleged in paragraphs 41a through 66a above.

ii) Commencing in or about May, 1972, and continuing through January, 1973, said defendants engaged in a similar scheme for the same purposes set forth in the First and Second Causes of Action to conceal from Professor Goldberg, from the SEC, from the investing public and from others interested in the matter, the fact that in June 1972, the Law Firm had entered into a written agreement with a new client, the Glacier General Assurance Company ("Glacier") to receive a contingent fee of two percent of the "gross offering price" of the company's securities in a pending public offering. In the preparation of the draft Registration Statement and prospectus for the Glacier registration and offering, said contingent finder's fee was not disclosed. When the true facts concerning the finder's fee were discovered

by counsel for the underwriter in the Glacier offering, defendants Alvin Sitomer, Stephen Sitomer and Robert Porges attempted to cover up their scheme to violate the securities laws by falsely stating that the Glacier fee agreement did not set forth the agreement of the parties thereto, and constituted a mere "draftsman's error" and when said defendants were requested to honor their ethical obligations to report their wrongdoing to the S.E.C., they refused to do so.

iii) On information and belief, commencing at a time prior to November 1971 and continuing at least through January, 1973, defendants Alvin Sitomer, Stephen Sitomer and Robert Porges engaged in a wholesale and flagrant conspiracy, device, scheme and artifice to violate Federal Securities laws and regulations by concealing finder's fee and/or stock purchase agreements and arrangements with approximately twenty other Law Firm clients who contemplated securities registrations and public offerings.

Amendment.

72a. By reason of the foregoing breaches of express and implied warranties and representations concerning the ethical standards and practices of the Law Firm and the ethical conditions of his employment, Professor Goldberg has suffered the injuries and damages heretofore set forth and detailed in paragraph 60a above.

FOURTH CROSS-CLAIM AGAINST DEFENDANTS ALVIN SITOMER, STEPHEN SITOMER AND ROBERT PORGES

73a. Professor Goldberg repeats and realleges the allegations contained in paragraphs 41a through 72a, the same as if they were fully set forth herein.

74a. By reason of the premises set forth in the Third Cause of Action (paragraphs 67a to 71a) and the false representations set forth therein at paragraph 68a, Professor Goldberg has been fraudulently induced to enter and remain in the employment of the Law Firm and, as a direct, immediate and proximate consequence, he has suffered the substantial injuries and damages set forth above in paragraph 60a.

WHEREFORE, additional defendant Goldberg demands judgment in the following respects:

1. Dismissing all cross-claims against additional defendant Goldberg;

Amendment.

2. In the event of any recovery of judgment in favor of any cross-claiming defendant or any of them on any or all of their cross-claims against additional defendant Goldberg, judgment over and against the Law Firm defendants jointly and severally and against each and all or some of them for indemnity and/or contribution in the amount of any judgment against Goldberg;

3. Damages against the Law Firm defendants and the Empire Defendants in the amount of $2,049,762.93 with interest; under the First Cross-Claim and Counterclaim;

4. Damages against the Law Firm defendants and the Empire defendants in the amount of $2,049,762.93 with interest; under the Second Cross-Claim and Counterclaim;

5. Damages against defendants Alvin Sitomer, Stephen Sitomer and Robert Porges in the amount of $2,049,762.93 with interest, under the Third Cross-Claim;

6. Damages against the defendants Alvin Sitomer, Stephen Sitomer and Robert Porges in the amount of $2,049,762.93 with interest, under the Fourth Cross-Claim;

7. Punitive damages against defendants Alvin Sitomer, Stephen Sitomer and Robert Porges in an amount not less than an additional $2,049,762.93, sufficient to punish them and to deter them from similar wrongdoing in the future;

Amendment.

8. The costs and disbursements attributable to this action.

9. Such other relief as to this Court may seem proper.

THAL & YOUTT

By _____
A Member of the Firm
Attorneys for Additional Defendant,
Stuart C. Goldberg
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Opinion, Mac Mahon, D.J., April 12, 1977.

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U. S. DISTRICT COURT
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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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DIETRICH MEYERHOFER and HERBERT FEDERMAN etc.,

Plaintiffs,

-against-

EMPIRE FIRE AND MARINE INSURANCE COMPANY et al.,

Defendants.

----------x

OPINION

73 Civ. 1940 (LFM)

45746

HERBERT FEDERMAN et al.,

Plaintiffs,

-against-

EMPIRE FIRE AND MARINE INSURANCE COMPANY et al.,

Defendants,

-and-

STUART C. GOLDBERG and JACOB ASCHKENASY,

Additional Defendants on Cross-Claims.

----------x

73 Civ. 4516 (LFM)

Opinion.

MacMAHON, District Judge.

Defendants, Empire Fire and Marine Insurance Company ("Empire"), Gary O. Gross and Yale J. Kaplan, officers and directors of Empire ("the Empire defendants), defendants Steven Sitomer, Alvin Sitomer, Robert Porges and Sitomer, Sitomer & Porges ("the Sitomer defendants"), and additional defendant Jacob Aschkenasy move to dismiss the claims against them for legal insufficiency, pursuant to Rule 12(b)(6), Fed.R.Civ.P. The Sitomer defendants and additional defendant Aschkenasy also challenge plaintiff Goldberg's pleadings for lack of clarity and conciseness under Rule 8(a)(2) and 8(e)(1), Fed.R.Civ.P. Finally, Aschkenasy moves to strike the claims against him as impertinent, pursuant to Rule 12(f), Fed.R.Civ.P.

The initial plaintiffs, Federman and Meyerhofer, originally brought this action as a class action against the Empire and Sitomer defendants and Goldberg alleging violations of the securities laws in connection with a public offering of the shares of the Empire Fire and Marine Insurance Company. They

alleged, among other things, that the registration statement was false and misleading in that it inflated the amount shown as received from the offering because it wrongfully failed to disclose that the defendant law firm (Sitomer, Sitomer & Porges), which represented Empire in connection with the offering, was to receive a $200,000 finder's fee from the proceeds. The class action plaintiffs, with court approval, subsequently dropped Goldberg as a defendant after he presented them with evidence that he was unaware of the finder's fee arrangement.[1]

The Empire defendants cross-claimed against the Sitomer defendants and against additional defendants Goldberg and Aschkenasy, both of whom worked on the offering, for, in effect, negligence and malpractice in preparing the registration statement. Goldberg, in turn, counterclaimed against Empire and cross-claimed against the Sitomer defendants and Aschkenasy, alleging that they conspired to violate the securities laws by failing to disclose the fee arrangement. He further alleged that the Sitomer defendants and Aschkenasy, as co-conspirators with the Empire defendants, misrepresented

to him the nature of the fee arrangement they had with Empire; that it was foreseeable that if the true arrangement became known he would be erroneously implicated in the wrongdoings; and that they thereby knowingly and intentionally exposed him to an unreasonable risk of harm from which he sustained various injuries.

The case was settled except as to the claims asserted by and against Goldberg, and the court approved the settlement in January 1976. We dismissed Goldberg's claims against the defendants in December 1976 for legal insufficiency but with leave to amend. Plaintiff subsequently filed an "amendment to amended answer" to which defendants' motions are now addressed.

The claims still present in this case, after settlement, are all state law claims. There is no question that we have the power to adjudicate such claims as they fall within our pendent jurisdiction because those claims and the original federal question securities claims were derived from a common nucleus of operative fact and the federal issues were substantial.[2] However, we must consider, in light of the principles enunciated

in United Mine Workers v. Gibbs,[3] whether we should decline to exercise such jurisdiction.

Pendent jurisdiction is a doctrine of the discretionary power of the court which need not be exercised in every case in which it is found to exist.[4] Judicial economy, convenience and fairness to litigants are the considerations which underpin its existence, and a federal court should hesitate to exercise discretionary jurisdiction over state claims unless those considerations are promoted.[5]

The interest of judicial economy and convenience would not be served in this case by the retention of jurisdiction over the state claims because the federal claims have been eliminated from the case. Addressing the problem in United Mine Workers, the Supreme Court taught that:

> "Needless decisions of state law should be avoided both as a matter of comity and to promote justice between the parties, by procuring for them a surer-footed reading of applicable law. Certainly if the federal claims are dismissed before trial, even

> though not insubstantial in a jurisdictional sense, the state claims should be dismissed as well. Similarly, if it appears that the state issues substantially predominate, whether in terms of proof [or] of the scope of the issues raised . . . the state claims may be dismissed without prejudice and left for resolution to state tribunals."[6]

The Second Circuit has consistently followed this policy[7] and recently ruled that, absent special circumstances, it would be an abuse of discretion to retain jurisdiction for trial of a pendent state claim on the basis of a federal question claim already disposed of by a Rule 12(b)(6) motion.[8]

Although the federal question claims in this case were settled rather than dismissed, we see no justification for distinguishing between the two in determining the propriety of retaining jurisdiction, for, in either case, the policies of avoiding needless decision of state law and promoting justice between the parties are equally applicable.

The "unusual circumstances" present in this case all argue against the retention of jurisdiction.

Plaintiff asserts four claims based upon substantially the same alleged facts. It is apparent that the alleged facts, as he readily admits, do not securely fit into any precedent or any traditional or established torts under New York law. Plaintiff argues, nevertheless, that the alleged facts are legally sufficient to constitute a claim for fraud and breach of warranty. Considering the conceded lack of precedent, recognition of a claim for relief or "cause of action" would constitute an extension of state law, a course this federal court is reluctant to take unnecessarily.

Moreover, plaintiff's major claim is that he has a "cause of action" for a non-conventional tort which he suggests we denote as injurious involvement. The recognition of such a non-conventional tort presents a number of novel and complex problems of state law and questions of state policy that state courts should decide. Even if we were convinced that plaintiff has stated a claim for relief for a non-conventional tort under basic tort principles and what little relevant precedent exists, there would still remain a number of

extremely complicated and unprecedented questions, such as the applicable statute of limitations, the allegations sufficient to state a "cause of action," and the damage components. All of these problems should be resolved by the state court.

We realize that relegating the parties to the state court would result in some delay. Nevertheless, the Supreme Court has held that dismissal of state claims may be merited even after trial,[9] and the only proceedings here respecting Goldberg's claims are two motions to dismiss for insufficiency. Furthermore, we think the issues of state law predominate over any issues of federal law, particularly in light of their novelty and complexity, even though one of the issues at trial is likely to be whether the Empire and Sitomer defendants violated the federal securities laws.[10]

Finally, we are mindful that decision of all the problems inherent in recognition of a right to maintain a "cause of action" on the facts alleged would serve as a precedent in a relatively uncharted area of state law. Principles of federalism and comity, therefore,

make this case peculiarly appropriate for resolution by a state court.

One final problem remains. If plaintiff is now relegated to the state court, he may be confronted with a statute of limitations problem, although this is unclear because it is uncertain what statute of limitations applies. Under these circumstances, we think plaintiff should retain the same right to prosecute this action in state court that he would have had if we had permitted the case to proceed here. It would work a harsh injustice upon plaintiff Goldberg if we were to dismiss his claims and it was later determined that he was barred by the statute of limitations because of the time that had elapsed while the case was before us.[11] The same considerations apply to the other defendants with claims against Goldberg.

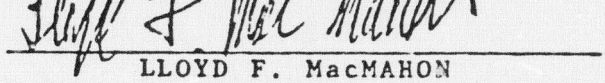
Accordingly, we deny the motions to dismiss without prejudice and retain jurisdiction over the case but suspend all further proceedings herein pending the commencement and final determination of an action or actions in state court encompassing all the state

claims, cross-claims and counterclaims of the parties alleged in this action.

So ordered.

Dated: New York, N. Y.

April 12, 1977



LLOYD F. MacMAHON
United States District Judge

Meyerhofer v. Empire Fire & Marine Ins. Co. et al. — 73 Civ. 1940 (LFM)
Federman v. Empire Fire & Marine Ins. Co. et al. — 73 Civ. 4516 (LFM)

FOOTNOTES

1 See Meyerhofer v. Empire Fire & Marine Ins. Co., 497 F.2d 1190, 1193 (2d Cir.), cert. denied, 419 U.S. 998 (1974).

2 See United Mine Workers v. Gibbs, 383 U.S. 715, 725 (1966).

3 Id.

4 Id. at 726.

5 Id.

6 Id. at 726-27.

7 See Calderone Enterprises Corp. v. United Artists Theatre Circuit, 454 F.2d 1292, 1297 (2d Cir. 1971), cert. denied, 406 U.S. 930 (1972); Abrams v. Carrier Corp., 434 F.2d 1234, 1254 (2d Cir. 1970), cert. denied sub nom. United Steelworkers v. Abrams, 401 U.S. 1009 (1971); Yanity v. Benware, 376 F.2d 197, 201 (2d Cir.), cert. denied, 389 U.S. 874 (1967).

8

Nolan v. Meyer, 520 F.2d 1276, 1280 (2d Cir.), cert. denied, 423 U.S. 1034 (1975).

9

United Mine Workers v. Gibbs, supra, 383 U.S. at 727.

10

Cf. Zwickler v. Koota, 389 U.S. 241, 244 n.4 (1967).

11

The tolling provisions of Section 203(d) or Section 205(a) or (b) of the Civil Practice Law and Rules may be applicable to the action so that any claim or defense of any of the parties will be timely in the state court action if timely asserted in this action. See Luoma v. Spearin, Prestin & Burrows, Inc., 282 A.D. 612, 126 N.Y.S.2d 543, 546-47 (1953), aff'd, 307 N.Y. 728, 121 N.E.2d 544 (1954); Park & Pollard Co. v. Industrial Fire Ins. Co., 197 A.D. 671, 189 N.Y.S. 866, 868 (1921). See also CPLR § 203(c); Seligson v. Chase Manhattan Bank, Nat'l Ass'n, 50 A.D.2d 206, 376 N.Y.S. 2d 899, 904 (1975).

United States Court of Appeals
for the Second Circuit

HerbertFederman et al.,
Plaintiffs,
against
Empire Fire and Marine Insurance Company et al.,
Defendants-Appellees,
and

Stuart C. Goldberg and Jacob Aschkenasy,
Additional Defendants on Cross-Claims,

Stuart C. Goldberg,
Additional Defendant on Cross-Claims,
Appellant.

AFFIDAVIT OF SERVICE

STATE OF NEW YORK,
COUNTY OF NEW YORK, ss.:

Jerry N. Simmons, being duly sworn, deposes and says that he is over the age of 18 years, is not a party to the action, and resides at 40-04 Vernon Boulevard, Long Island City, New York
That on September 1, 1977, he served 2 copies of Brief and 1 copy of Appendix

on

Aranow, Brodsky, Bohlinger,
Benetar & Einhorn
469 Fifth Avenue,
New York, New York, 10017.

D'Amato, Costello & Shea,
By: Robert E. Meshel, Esq.,
116 John Street,
New York, New York, 10038.

Davis & Davis,
116 John Street,
New York, New York, 10038.

by delivering to and leaving same with a proper person or persons in charge of the office or offices at the above address or addresses during the usual business hours of said day.

Jerry N. Simmons

Sworn to before me this
1st day of September, 1977

John V. Bresnan

JOHN V. BRESNAN
Notary Public, State of New York
No. 30-0932350
Qualified in Nassau County
Commission Expires March 30, 1979